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The Arthur and Elizabeth  
**SCHLESINGER LIBRARY**  
on the History of Women  
in America











T H E  
L A W S  
R E S P E C T I N G  
W O M E N,  
As they regard their NATURAL RIGHTS,  
O R T H E I R  
C O N N E C T I O N S A N D C O N D U C T;

In which their Interests and Duties as

DAUGHTERS,  
WARDS,  
HEIRESSSES,  
SPINSTERS,  
SISTERS,

WIVES,  
WIDOWS,  
MOTHERS,  
LEGATEES,  
EXECUTRIXES, &c.

Are ascertained and enumerated:

Also, the Obligations of

P A R E N T A N D C H I L D,  
And the Condition of  
M I N O R S.

The Whole laid down according to the Principles of the Common and Statute Law, explained by the Practice of the Courts of Law and Equity, and describing the Nature and Extent of the Ecclesiastical Jurisdiction.

In which are inserted a great Variety of curious and important Decisions in the different Law Courts, and the Substance of the Trial of ELIZABETH Duchess Dowager of KINGSTON, on an Indictment for Bigamy, before the House of Peers, April 1776.

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I N F O U R B O O K S.

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*Ut monitus caveas ; ne forte negoti  
Incutiat tibi quid sanctorum inscitia legum.*

HOR.

Caution'd, beware ; lest direful Ills attend  
Those who thro' Ignorance of Law offend.

ANON.

---

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Printed for J. JOHNSON, No. 72, St. Paul's Church-Yard.  
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396.2

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T H E  
P R E F A C E.

**T**H E expediency of digesting the laws of England under important heads, is indisputably clear from the voluminous amplitude of those books, which contain our system of jurisprudence. A nation, whose constitution is founded on the principles of liberty, whose commerce is extended over the whole circumference of the globe, whose internal wealth, as consisting in landed property and monied interests, is great almost beyond example, together with its never-failing concomitant luxury, must necessarily furnish continual occasion for the creation of new laws ; to ascertain rights of individuals which were before unattended to, because such situations were unknown ; to adjust the nice distinctions with regard to property, occasioned by the civil intercourses and alliances of families, the negligence and profusion of the dissipated, the inattention of some, and rapaciousness of others, the concerns of commerce,

merce, the interests of those who compose the legislative part of government, and of those of the body of the people. From hence arise the multiplication of written law, and of the decisions founded thereon: and hence it is that the statute law, during the present reign of sixteen sessions of parliament, is in bulk equal to all the statutes from Magna Charta to the demise of queen Ann, a period of five hundred years<sup>a</sup>,

It appeared to the author of this digest, that no selection could be made from the venerable pile of law-learning and precedents, more generally important and useful, than the laws which treat of the concerns of women, and the interests arising to men, from their connections and alliances with women: he is therefore inclined to hope, that what is the result of those studies, which have been prosecuted with a well-meant design, will meet with a candid reception: for if the great bulk of the body of the laws of England is generally complained of as a public burden, every attempt to lighten it may hope to prepossess the public in its favour,

That the laws of England are now rescued from the perplexity and intricacy in which they were formerly involved; that the principles on which they are built are traced, and shewn to be founded on impartial justice and right reason; that they are proved to be uniform and consistent with themselves, and though branched out into an almost infinity of points, yet that each part contributes to form one uniform whole; that they are perfectly well calculated to be made the pursuit of gentlemen of liberal fortunes, who cultivate an acquaintance with the *Belles Lettres*, as well as to constitute the lucubrations of the law-student, who studies

<sup>a</sup> See Ruffhead's edition of the Statutes.

## T H E P R E F A C E.

them professionally, is owing to the indefatigable study, to the penetrating acuteness, and elegant pen of Sir William Blackstone, in whom are happily united depth of thought, clearness of arrangement, consummate knowledge, and elaborate composition. Although modern times have not produced a Justinian to form a regular code of laws, from indigested, dry, and endlessly copious materials, yet we have seen a private man effect so arduous a work in the most complete and satisfactory manner : hereby confirming what a learned writer observed two centuries ago. “ Of law,” says he, “ no less can be acknowledged than that her seat is the bosom of God ; her voice the harmony of the world. All things in heaven and earth do her homage ; the very least as feeling her care ; and the greatest as not exempted from her power <sup>b</sup>.” Nor should it be considered as panegyric to say, that this accomplished lawyer has done to the laws of England, what Newton did to the laws of nature, and Locke to those of human intelligence.

Neither is it to this learned judge only that the public at large are indebted for that knowledge which respects our dearest and most essential interests as members of society. The skilful, accurate, and judicious Dr. Burn, is entitled to the warmest acknowledgments, for those practical arrangements which he has made of the laws of England, which have been found of the most essential service in regulating the course of justice, and ascertaining points of general concernment. And the author of the following work is not ashamed to acknowledge his own obligations to these two respectable law authorities ; solicitous as he is to gain the suffrages of mankind in his favour, he does not wish to pluck the laurels from another's brow ; for next to the pleasure of having acted

<sup>b</sup> Hooker, c. I. page 6.

meritoriously ourselves, is that of bestowing due praise on those who have eminently excelled.

England has been stiled the Paradise of women; nor can it be supposed that in a country where the natural rights of mankind are enjoyed in as full an extent as is consistent with the existence and well-being of a great and extensive empire, that the interests of the softer sex should be overlooked. A nation of men characterised for bravery, generosity, and a love superior to mean suspicions, must consider the happiness of women as inseparably blended with their own. When public virtue prevails, each individual will have the justest idea wherein his own private happiness really consists, and he will place it in those domestic endearments which arise out of mutual love: mutual confidence will ripen mutual affection, and the only family contest will be who shall contribute most to the general stock of happiness. In proportion as the refinements of life, and the creation of artificial wants oppose themselves to the simplicity of nature, men rove at large in pursuit of gratification, and the band of domestic union becomes relaxed. The natural rights of women therefore are most readily acknowledged during those periods of society, in which simplicity of manners most prevails. The ferocity of barbarism is unfriendly to every soft sensation: love is then what a great critic supposes it to be in civilized societies, *one of many passions*: the only distinction in such communities is that of the strong and the weak; and on the other hand, when unbridled luxury has rendered mankind debauched and unprincipled, the dissolute manners of a courtesan are admired, whilst the solid accomplishments of a virtuous woman have no attractions. The men become domestic despots, and though the politeness of



such times may restrain them from gross acts of violence, yet they indulge themselves in a species of cruelty not less oppressive and painful, if the torture of a susceptible mind is superior to any bodily suffering. Whilst men allow themselves in a wanton gratification of their passions, they expect from their wives an unexceptionable conduct, yet these very men are the most forward and loud in stigmatising the whole sex as governed by whim, caprice, inconstancy, and an unbounded love of pleasure, at the same time that they expect that a nice sense of honour should make them steadily adhere to what is right; that the satisfactions arising from self-approbation should lead them to overlook, or at least not to resent, every species of negligence and indifference shewn them by those husbands; and that the principles of duty and moral obligation should fortify them against all the attacks of pleasure or vice. Do not such men indirectly and undesignedly pay the sex the highest eulogium, whilst they professedly inveigh against them; by supposing them to possess principles that are proof against the strongest temptations combined? And experience surely proves, that their tacit praise is better founded than their open censure<sup>d</sup>. But the whole system of a man of pleasure is built upon absurdity and contradictions.

Athens, that seat of learning, arts, and refinement, is said anciently to have admitted women to a share of their public deliberations; and in those times, which are handed

<sup>d</sup> A general rule is not exploded because there are a few exceptions to it.— A very able reasoner on political evils has the following remark: “Conjugal fidelity,” says he, “is always greater in proportion as marriages are more numerous and less difficult. But when interest or pride of families, or paternal authority, not the inclination of the parties, unite the sexes, gallantry soon breaks the slender ties, in spite of common moralists, who exclaim against the effect whilst they pardon the cause.”

down to us by the most authentic histories, we find in that state women who distinguished themselves in various branches of science, insomuch that the greatest philosopher of antiquity<sup>e</sup> was taught eloquence by a woman<sup>f</sup>. But not to insist on what may perhaps be more properly considered as exceptions to a general rule, the accomplished Pericles, in an oration, addressed himself professedly to the Athenian women, in which he with great propriety assigns them the sphere in which they ought to move: "Be ambitious," says he, "of attaining those virtues which are the principal ornament of your sex; cherish your instinctive modesty; and look upon it as your highest commendation, not to be publicly talked of<sup>g</sup>." A plain proof that right reason speaks the same language in all ages of the world, and is confined to no particular period of time, or district of the globe. Instances of conjugal affection, and proofs of the high estimation in which women were held by the greatest warriors of antiquity, may be met with in Homer; but his account of the parting of Hector and Andromache, in the sixth book of the Iliad, is particularly beautiful.

In the primitive ages women were married without portions from their relations, being purchased by their husbands, whose presents to the woman's relations were called her dowry; but when civility and good manners came to be established in any place, it was usually laid aside; for Aristotle makes it one argument to prove that the ancient Grecians were an uncivilized people, because they used to buy their wives<sup>h</sup>. No sooner therefore do we find them beginning to lay aside their barbarous manners, but this practice was left off; insomuch that Medea, in Euripides, complains that wo-

<sup>e</sup> Soerates.<sup>f</sup> Arpasia.<sup>g</sup> Thucydides, lib. 2.<sup>h</sup> Politic. lib. II. cap. 8.

men were the most miserable of all rational creatures, because lying under a necessity of purchasing their own masters at a dear rate<sup>l</sup>. So frequent became the custom for women to bring portions to their husbands, that some make the most essential difference between wife and concubine among the Greeks to consist in this, that wives had dowries, whereas concubines were usually without<sup>k</sup>. And in England it seems to have been an ancient custom for the husband to pay a portion to the father or relations of the woman, on receiving her from them at the church porch<sup>l</sup>.

The Romans, when they committed the rape of the Sabine women, were no better than a savage banditti; but the natural genius of that people, though always fierce and warlike, had a peculiar aptitude to imbibe those principles that cement and strengthen society: public spirit, and a love of their country, actuated them universally. Their bravery was a settled rooted principle, which whilst it attached every individual of their society to the public weal, led them to indulge the passion of love with a manly sensibility. Their women were inspired with the same sentiments. The attachments between the sexes were strong, because they were founded on an exact conformity of mind: the martial spirit which warmed the husband's breast, excited the affection of the wife; and the women in the ages of Roman simplicity, were as much distinguished for greatness of soul, inflexible firmness, and unsullied chastity; as the men for valour, constancy and affection: and notwithstanding the Roman laws allowed a husband to divorce his wife on many pretexts, yet so memorable were those times for constancy, that almost six hundred years elapsed from the building of

<sup>l</sup> Eurip. Med. 230.

<sup>k</sup> Potter's Antiq. b. IV. cap. 11.

<sup>l</sup> Smith's

Commonw. b. III. c. 8.





treated; and in cases of extreme hardship would cause equity to supply the defects of natural affection.

Who is the author of the following work, is a question of much less consequence, than, has his work any merit? The author of a book is not like a conjurer, or a rope-dancer, who must exhibit themselves personally to make their skill apparent. A book is like current coin, if it has weight and intrinsic value, it is not the less current because the image and inscription cannot be ascertained; and it in vain looks splendid if these essentials are wanting.



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- 11.—11. *for*, but the defamation must be for matters temporal, *read*,  
but the defamation must not be for matters temporal.
- 22.—ult. note, *for*, 3 Inst. 220, *read*, 3 Just. 220.
- 138.—2. *for*, leaving, *read*, living.
- 219.—10. *for*, and were bound to believe, *read*, and were led to believe.
- 233.—13. *for*, and the equitable in the, *read*, and the equitable in-  
terest in the.
- 238.—note to, see page , add 145, 146.
- 246.—21. *for*, it, *read*, them.—27. after death, add, the devise is not  
good, if the land descends to the heir. But if he devise  
the corn growing on such land at the time of his death.
- 247.—15. *for*, and his heirs, *read*, and the heirs of his body begotten,  
see page 236.
- 261.—19. *for*, part, *read*, parts.
- 262.—10. *for*, lord chief justice, *read*, lord chancellor.
- 274.—16. *for*, thought, *read*, through.
- 293.—6. *for*, committable, *read*, committible.
- 327.—note, *for*, Brough, *read*, Brown.
- 341.—26. *for*, and the statute devises, *read*, and the statute directs.
- 381.—23. *for*, making it hath no son, *read*, making it he hath no son.
- 386.—25. *for*, lineage, *read*, ligeance.
- 398.—25. after, possession, add, and twenty years possession.—30. after,  
possession, dele, and twenty years possession of the  
cottage.
- 408.—13. *for*, 1773, *read*, 1733.
- 416.—27. *for*, crimes, *read*, was,

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T H E  
L A W S  
R E S P E C T I N G  
W O M E N.

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B O O K   T H E   F I R S T .

*Of the Laws that respect the personal Security, Rights,  
and Privileges of Women.*

---

C H A P. I.

*Of the Dignities conferred on Women by the Constitution and  
Laws of England.*

*Of the Female Succession to the Crown of England.*

**B**Y the laws of succession established in this country, a female may succeed to the crown, if the next heir to the preceding sovereign. Such were queen Mary, queen Elizabeth, Mary the wife of William the Third, and queen Anne. The supreme government of the state is as fully entrusted to such female as to a male.

The husband of a queen regnant is her subject, except in the case of king William, who by the parliament of England was elected, and recognized their joint sovereign with his consort queen Mary, which arose entirely from the exigencies of the state at that time, and the personal qualities of the prince of Orange; for when the princess Ann succeeded to the crown, thus placed on the heads of her sister and brother-in-law, although she was then married to the prince of Denmark; yet as the right of succession to the throne vested in her alone, so the supreme authority continued with her so long as her husband lived, as it had before done in the reign of the first queen Mary, and even without the nominal honour, which the husband of the former possessed.

The husband of a queen regnant, being her subject, may be guilty of high treason against her; but in the instance of conjugal infidelity, he is not subject to the same penal restrictions as the queen consort; for which the reason seems to be, that if a queen consort is unfaithful to her royal bed, this may debase or bastardize the heir to the crown; but no such mischief can ensue from the infidelity of the husband to the queen regnant.

### *Of a Queen Consort.*

**T**HE wife of the reigning king is, in consequence of her marriage, entitled to many peculiar privileges. She alone is exempted from the general laws respecting married women, which do not consider them as capable of possessing any property in their own right. She hath separate courts and officers distinct from the king's, not only to increase the splendor and state of her appearance, but the deference paid to her is observed even in the courts of law; and

## RIGHTS AND PRIVILEGES OF WOMEN. 3

and her attorney and solicitor general are entitled to a place within the bar of his majesty's courts, together with the king's council. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods, as well as land, and has a right to dispose of them by will. So that in all legal proceedings, she is looked upon as a single, not as a married woman <sup>a</sup>. It is equal treason to compass her death, as the death of the king himself <sup>b</sup>; and to violate her chastity is a crime of the like magnitude, both in the person committing the fact, and in the queen herself if consenting. In the time of Henry VIII. a law was made <sup>c</sup>, whereby if the king, or any of his successors, shall marry a woman that was before incontinent, if she conceal the same it shall be high treason; but this law was repealed in the next reign. The trial of a queen is before the house of peers.

### *Of a Queen Dowager.*

A Queen dowager, as the widow of a king, retains most of the privileges belonging to her whilst queen consort; and though an alien born, is entitled to dower on the king's demise, which no other alien is. It is high treason to conspire her death. No man can marry a queen dowager without special licence from the then reigning prince, on pain of forfeiting his lands and goods. A queen dowager, if she marries a subject, does not lose her regal dignity, as dowager peeresses do their peerage when they marry commoners. For Katharine, queen dowager of Henry V. though she married a private gentleman, yet, by the name of Katharine queen of England, she maintained an action against the bishop of Carlisle. So also the queen

<sup>a</sup> Finch, L. 86. Co. Lit. 133.

<sup>b</sup> 25 Edw. 3. ft. 5. c. 2.

<sup>c</sup> 33 H. VIII. c. 21. repealed 1 E. VI. c. 2. & 1 M. Sess. 1. c. 1.

dowager of Navarre marrying with Edmond, brother to king Edward I. maintained an action of dower by the name of queen of Navarre <sup>d</sup>.

*Of the consort of the Prince of Wales, and of the Princess Royal.*

**T**HE consort of the prince of Wales, and the princess royal his eldest sister, are peculiarly regarded in the statute before recited <sup>e</sup>, for to violate the chastity of either is high treason. And the principle on which this is founded seems to be the same as created the like crime of the king's consort high treason, as in either case the blood royal is liable to be tainted with bastardy; but why the same offence committed against the consorts of any of the king's sons should not be liable to the same punishment, seems rather difficult to account for, as they or their male issue must succeed in due order, before the female line in the princess royal can succeed at all; therefore the purity of descent in the male line throughout is more important than any of the female line. The eldest daughter of the king is in other respects likewise distinguished by our laws from her younger sisters; insomuch that upon this, united with other (feodal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only: <sup>f</sup> for the younger sons and daughters of the king who are not in the immediate line of succession, are little further regarded by the laws than to give them precedence to all peers and public officers, as well ecclesiastical as temporal. By an act passed 12th of the present reign, chap. 11. no descendant of his late Majesty George II. (other than the issue of princesses married, or who may marry into foreign families) shall be capable of contracting matrimony without the previous consent of his Majesty, his

<sup>d</sup> 2 Inst. 50.

<sup>e</sup> 25 E. III. Stat. 5. c. 2.

<sup>f</sup> Blackf. b. 1. c. 4.

heirs,

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heirs, &c. signified under the great seal, declared in council, and entered in the privy-council books. Every marriage of any such descendant, without such consent, shall be null and void. But in case any descendant of king George the Second, being above twenty-five years of age, shall persist in contracting a marriage disapproved of by his Majesty ; such descendant, after giving twelve months notice to the privy-council, may contract such marriage, and the same may be duly solemnized, without the previous consent of his Majesty ; and shall be good, except both houses of parliament shall declare their disapprobation thereof.

### *Of Peeresses.*

**I**F a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers ; but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity. Nothing being more reasonable, than that what she gained by marriage, should be liable to be lost by the same means. But if a woman marries a peer of a superior order, and on becoming a dowager, afterwards marries a peer, but of an inferior rank, she is allowed to retain her first title ; this being considered as no degradation, for the law considers all peers as pares. <sup>s</sup> And it is now settled by the unanimous opinion of the judges, that a peeress convicted of a clergyable felony, praying the benefit of the stat. 20 Hen. VI. c. 9. is not only excused from capital punishment, but ought to be immediately discharged without being burnt in the hand, or liable to any imprisonment. The lord chief justice of the Common Pleas, on the trial of the duchess dowager of Kingston, declaring that “ peers is a word capable of including the whole body of the peerage, females as well as males ; and every personal privilege conferred on peers is by

operation of law communicated to peeresses, whether by blood or marriage, though only males are mentioned. As trial by peers, though only recognized in Magna Charta, as belonging to the male sex, did by construction of law belong to females, as appears by 20 Hen. VI. c. 9. which is only a declaratory law; so any other personal privilege granted or confirmed to peers generally, is communicated to females, if it is of a nature capable of being communicated to and enjoyed by them; as trial by peers; freedom from arrest: and if those privileges are so communicated, as they certainly are, why should not this given by 1 Edw. VI. c. 12. s. 14. the consequence of which is so reasonable and agreeable to justice, that a female offender shall not undergo a greater punishment than a male of her own rank would do for a crime of the same sort? <sup>a</sup>

Opinion of the judges taken by the house of peers  
in the case of the duchess of Kingston.

<sup>a</sup> With the most profound deference to such respectable authority, I would beg leave to observe, that this right of peeresses found guilty of clergyable offences to be excused from burning in the hand, is founded on no express words of any statute, but is derived by implication merely, and a very liberal exposition of the statute of Edward VI. c. 12. s. 14. taken in connection with 20 Hen. VI. c. 9. And what greatly weakens the foundation on which this liberal construction is built, is, that no provision was made by any statute to mitigate the punishment of women for any felony, though men in general were then admitted to claim the benefit of their clergy, until the 21 James I. c. 6. which puts them on the same footing with men, with respect to petit larcenies, and by 3 & 4 W. c. 9. s. 6. they are allowed to pray for the like benefit which men claim from their clergy, for all felonies committed by them, to which the benefit of clergy is granted to men. Now can it be supposed, that any law should mean to take off the lesser punishment (burning) from women of a certain rank, while the greater (death) was in force against the whole sex? But when the laws wear an aspect of partial severity, by excluding certain persons from a privilege to which they appear to have an equitable right; when a worthy character is liable, through *mistake*, to the punishment the law inflicts, every principle of humanity inclines us to temper justice with mercy, in order to do a great right, that we should do a little wrong.



# RIGHTS AND PRIVILEGES OF WOMEN.

## C H A P. II.

### *Of the Condition of Women ; their Privileges and Obligations.*

**N**ONE shall take by force any maiden within age, (that is, the age of twelve, which is the age of consent to marriage, 2 inst. 182) neither by her consent, nor without it ; nor any wife or maiden of full age ; nor any other woman against her will, on pain of imprisonment for two years, and after fine, at the king's will. <sup>1</sup>

What is commonly called stealing an heiress, is more technically styled by the law, forcible abduction and marriage. The law respecting this offence runs thus ; “ if any person shall for lucre take any woman, maid, wife, or widow, having substance either in goods or lands ; or being heir apparent to her ancestors, contrary to her will, and afterwards she be married to such misdoer, or, by his consent, to others, or defiled ; such person, and all his accessaries, shall be deemed principal felons, and not be entitled to the benefit of clergy ;” but accessories after the fact are allowed benefit of clergy <sup>k</sup>. Of which see more in the third part of this work,

Women are excused attending court leets ; and if a woman is an appellant, or approver in the trial by battel, duel, or single combat, she may complead and refuse the wager of battel, and compel the appellee to put himself upon the country. Although this method of trial still remains in force, it is entirely disused. The nature of this trial is, a presumptuous appeal to providence, from an expectation that

<sup>1</sup> 3 Edw. I. c. 13.

<sup>k</sup> 3 Hen. VII. c. 2. 39 Eliz. c. 9.

## **I THE PERSONAL SECURITY,**

heaven would unquestionably give the victory to the innocent or injured party. Such kind of trial is of great antiquity, and was first introduced into England on the Norman conquest; a short account of which may not be thought an unentertaining digression. It was made use of in determining civil, military, and criminal causes. The last trial of battel that was joined in a civil suit, (though there was afterwards one in the court of chivalry, in the reign of Charles the first; <sup>1</sup> and another tendered but not joined in a writ of right upon the northern circuit 1638) was in the 13th year of queen Elizabeth, A. D. 1570, and was held in Tothill-fields, Westminster<sup>m</sup>. When a tenant in a writ of right pleads the general issue, viz. that he hath more right to hold, than the demandant hath to recover; and offers to prove it by the body of his champion; who by throwing down his glove as a gage or pledge, thus wages, or stipulates battel with the champion of the demandant, who by taking up the glove or gage, stipulates on his part to accept the challenge. The reason why it is waged by champions in civil actions, and not by the parties themselves, as was done in a criminal suit, is, because, if any party to the suit dies, the suit must abate, and be at an end for the present; and therefore no judgment could be given for the lands in question, if either of the parties were slain in battel, and also that no person might claim an exemption from this trial, which was the only decision of a writ of right after the conquest, till the time of Henry the second; a period of about half a century,

The following is an account of the trial by battel as it was waged in 1570. Sixty feet square was allotted for the combatants, which was enclosed; the judges of the court of

<sup>1</sup> Rush. Col. V. 2. p. 2. fol. 112.

<sup>m</sup> Dyer's Rep. 302.

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common pleas were seated on one side in their scarlet robes, attended by the serjeants at law. The court ought to set by sun-rising, and proclamation being made, for the parties and their champions, they are introduced by two knights, dressed in a suit of armour, with red sandals, bare-legged from the knee downwards, bare-headed, and with bare arms to the elbows. The weapons allowed them were only batons, or staves, of an ell long, and a four-cornered leathern target ; so that death very seldom ensued this civil combat. When the champions thus armed arrive within the list or place of combat, the champion of the tenant then takes his adversary by the hand, and makes oath, that the tenements in dispute are not the right of the demandant ; and the champion of the demandant then taking the other by the hand, swears in the same manner that they are : next an oath against forcery and enchantment is to be taken by both the champions in such form as the following.

“ Hear this ye justices, that I have this day neither eat,  
“ drank, nor have upon me, neither bone, stone, ne grass  
“ nor any enchantment, forcery, or witchcraft, whereby the  
“ law of God may be abased, or the law of the devil ex-  
“ alted ; so help me God and his saints.” The combat thus begun, the champions are bound to fight till the stars appear in the evening : and if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause. For it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession : but if victory declares itself for either party, for him is judgment finally given. This victory may arise from the death of either of the champions ; which indeed hath rarely happened : or victory may be obtained if either champion proves *recreant*, that is, yields, and pronounces the horrible word of *craven* ; a word of disgrace and obloquy rather than of any determinate meaning. But a horrible word

word it is indeed to the vanquished champion : since as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned as a recreant to become infamous, and not to be accounted a free or credible man : being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause. Such is the form of a trial by battel, which is still in force if the parties choose to abide by it <sup>a</sup>.

It is held to be good law that a woman is eligible to the office of a constable, since if chosen she may procure a man to serve for her ; <sup>o</sup> but a woman, although a substantial householder, cannot be chosen an overseer, as appears from the following decision. A mandamus was moved for to the justices, to appoint two substantial householders to be overseers of the poor of the parish of Chardstock, in the county of Dorset ; and there was an affidavit, that at a meeting of the parish after Easter last, a man and a woman were elected overseers ; and at a meeting of the justices, they approved of the man, and refused the woman, as being an unfit person to serve as overseer ; and the old overseers refusing to nominate any other, the justices approved of the man only.—By Powel j. a woman is not to be an overseer of the poor ; and there can be no custom in a parish to put her in, because of her being an householder. And Parker c. j. directed, that the parish should apply to the justices to have another nominated, and if they refused, then to apply to that court for a mandamus the next term <sup>p</sup>.

### *Of Midwives.*

**I**N order for a midwife to obtain a licence, she must be recommended under the hands of matrons who have experienced her Skill, and also of the parish minister certi-

<sup>a</sup> Blackst. b. 3. c. 23. <sup>o</sup> 2 Hawk. 63. <sup>p</sup> E. 10 An. Vin. Abr. tit Poor A. fying

fying as to her life and conversation, and that she is a member of the church of England.—If there be a suit in the spiritual court against a woman for exercising the trade of a midwife, without licence of the ordinary, against the canons, a prohibition will lie, for this is not any spiritual function of which the court has cognizance <sup>q</sup>.

### *Of Defamation.*

**C**AUSES of defamation are triable in the spiritual courts, where pecuniary damages are not sued for, and against the proceedings of the spiritual judge in such cases a prohibition does not lay<sup>r</sup>. But the defamation must be for matters temporal. Thus, a suit being commenced in the spiritual court for calling a woman *quean*, a prohibition was granted, because of the uncertain import of that word<sup>s</sup>. Nor must the suit for defamation be, for matter of spiritual cognizance mixed with temporal ; but to entitle the spiritual court to uncontrollable jurisdiction, the defamation must be for matters merely spiritual. If the party defamed doth not commence an action within a year, from the time of uttering the words, the action is taken away by the lapse of the year. But this rule does not bind a plaintiff if out of the kingdom ; for such may institute a suit within a year after his return. On a suit being brought into the spiritual court for these words, “ you are a rogue, rascal, whore-master, and son of a perjured affidavit bitch,” a prohibition was moved for, and all the words being waved but the word whore-master ; none of them being such as an action may be brought for at the common law, it was urged that it was only a word of heat, and that words of passion are not defamatory, but regarded by the hearers no

<sup>q</sup> 2 Rolls. Abr. 286.      <sup>r</sup> 13 Edw. I. St. 4. Stat. of Circumspecte agatis.

<sup>s</sup> Cod. 517.

more than the words of one *non compos mentis*, or mad. But lord ch. j. Holt held, that to say whore-master of a man is the same with whore of a woman, which is an ecclesiastical slander, and a prohibition was denied <sup>t</sup>.

By the custom of London whores are to be carted; and therefore if a person calls a woman whore in London, an action on the case lays, in respect of the punishment they are subject to by the custom; but the party cannot be pronounced against in the spiritual court for defamation, for that would be punishing the delinquent twice for the same offence <sup>u</sup>.

Libel in the spiritual court for the word whore, which upon the face of the libel appeared to have been spoken in London, and after sentence it was moved for a prohibition, because the defect of jurisdiction appeared in the libel itself, and the court would judicially take notice of the custom of London, where an action lays for the word whore. But the court declared the rule to be, that matter shall never be alledged out of the libel as ground for a prohibition after sentence, but the foundation of granting it must arise out of the libel itself in defect of jurisdiction. And if there be a defect of jurisdiction appearing in the libel, then the party never comes too late; for the sentence and all other proceedings are a mere nullity. But where the spiritual court hath an original jurisdiction, which is to be taken from them upon account of some matter arising in the suit; as for defect of trials; there, after sentence, the party shall never have a prohibition, because he himself hath acquiesced in their manner of trial, which is a waiver of the benefit of the common law trial. It is true these words appear to have been spoken in London, But how doth the custom

of London appear to the court? there is nothing of that in the libel, and though we have such a private knowledge of it, that upon motion we do not put the party to produce an affidavit, because the other side never disputes it, yet we cannot judicially take notice of it; and if any body should insist on an affidavit we must have it in every case. It was never known that the court judicially takes notice of private customs, but they are always specially returned <sup>v</sup>.

A prohibition was prayed for and granted against a suit in the court christian, in which a wife libelled for words which appeared on the libel to be spoken in London. The words were, speaking to her husband, "you are a cuckoldly old rogue, and was cuckolded by a porter." The court holding that prohibitions might be granted for words that are tantamount to whore, although the custom of London extends to that word only <sup>w</sup>, so likewise the word strumpet was held to be within the custom of London<sup>x</sup>.

On a libel in the court christian for calling the plaintiff a *bastard-maker*, and the defendant justified because he had been proved to have been such before two justices of the peace: which plea the judges in the court christian refused. On which a prohibition was granted <sup>y</sup>.

A woman libelled in the spiritual court for these words: "You are a bawd," and a motion was made for a prohibition, on the ground that an action in the temporal court would lie; but the court distinguished these words from the implication of keeping a bawdy-house, which is punishable as a temporal offence. But for the word bawd only, no action will lie, that being perhaps no more than a solicitation

<sup>v</sup> Str. 187.    <sup>w</sup> Ibid. 471.    <sup>x</sup> Ibid. 555.    <sup>y</sup> 2 Roll's Rep. 82.

of chastity. The rule was therefore discharged. If a man who hath lands by descent, sue in the ecclesiastical court against another, for calling him bastard, a prohibition shall be granted; for that tends to a temporal disinherittance<sup>a</sup>. —But on an action upon the case for saying, that the plaintiff had two bastards and should have kept them; by reason of which words discord arose between him and his wife, and they were likely to have been divorced; judgment was given for the defendant; because no temporal loss is given in proof; as, loss of marriage, or the like, and the imagination of being divorced, carries no weight<sup>b</sup>.

In an action upon the case, the plaintiff stated, that whereas there was a communication of marriage to be had between the plaintiff and one Anthony Elcock, the defendant, to the intent to hinder the said marriage, said and published, that there was a grocer in London that did get her with child, and that she had a child by the said grocer; whereby she lost her marriage; to which the defendant pleaded not guilty; and was found guilty at the assizes at Aylesbury to the damages of two hundred marks. It was pleaded in arrest of judgment, That the matter on which the action was founded was merely of spiritual cognizance, and therefore not cognizable by the temporal courts, but over-ruled by the court; for a woman not married cannot by intendment have so great advancement as by her marriage, whereby she is sure of maintenance for her life, or during her marriage, and dower, and other benefits which the temporal laws give by reason of her marriage; and thereby in this slander she is greatly prejudiced in that which is to be her temporal advancement, for which it is reasonable to give her remedy at the common law<sup>c</sup>.

<sup>a</sup> Str. 1100.<sup>a</sup> 2 Roll's Ab. 292.<sup>b</sup> Case of Barnard & Beale, E. 16.

Ja. I. Cro. Ja. 472.

<sup>c</sup> Case of Davies & Gardiner T. 35. Eliz. Poph. 36.



If any person is called to answer in a cause of defamation, if the plaintiff hath also defamed the defendant, the defendant may in the very same cause re-convene the plaintiff, that is, he may give a libel in the presence of the plaintiff or his proctor, though no citation was first taken out against him. But in these cases of re-convention, the parties must proceed together in the contesting of suit in desiring one and the same term probatory, in the producing witnesses, in the conclusion, and in the pronouncing sentence; and so on in all things unto the end of the suit. And if defamatory words mentioned in the libel are mutually proved, a mutual compensation is to be made, both as to the penance and the charges. That is, there ought to be no penance enjoined, nor any condemnation of charges on either part. But it is otherwise where two separate causes of defamation are commenced. And note, that in causes of re-convention, though a compensation may be made between the parties, yet seeing defamers are by law to be corrected, the judge may if he pleases correct these defamers *ex mero officio* at his pleasure <sup>d</sup>.

A wife libelled in the spiritual court for calling her "whore," and there being proceedings likewise for defamation against her by the other party, the two husbands entered into an agreement to stay proceedings on both sides: and upon one of the wife's going on, the husband moved for a prohibition: but it was denied by the court.—The suit is by the wife to recover her fame, and it is not in the power of the husband to restrain her <sup>e</sup>. But if a feme covert sue in the spiritual court, and recover costs, if the husband release them, the wife is barred. For since the husband is liable to the charges of the suit commenced by the wife, he shall have the costs in recompence; he is further entitled to

<sup>d</sup> Clarke, Tit. 134.

<sup>e</sup> Str. 576.

them, because the wife cannot have a chattel interest exclusive of her husband. But if the husband dies, the wife shall have them, and not the executors of her husband, because they were a thing in action<sup>f</sup>.—The punishment for defamation is penance, to be enjoined at the discretion of the judge. And after passing sentence, the judge declares in the presence of the offender, or his proctor, the manner in which the penance shall be performed. And if the party is present, he is admonished by the judge (otherwise a monition issueth against him under the seal) to take out of the registry of the court a schedule of his penance, and to perform the same according to the form of the same schedule, and to make certificate of the due performance thereof, on or before such court as shall be appointed; and also to pay the costs taxed within a time limited, on pain of excommunication<sup>g</sup>.—See particularly of penance in the third part of this work.—If the words were spoken in a public place, then the penance is usually enjoined to be done publicly, as in the church of the parish where the defamed dwells, in time of divine service, in the presence of the person defamed, (if he has a mind to be present) but not covered with a linen garment as in causes of correction. But if the words were spoken in a private place, then the penance is done in the house of the person defamed, or of the minister, or of some honest neighbour. And the form of words usually is this. The defamer publicly pronounces, that by such and such words as are set forth in the sentence to have been spoken by him, he hath defamed the plaintiff, and therefore that he begs pardon and forgiveness, first of God, and then of the party defamed, for his uttering such words<sup>h</sup>.

<sup>f</sup> Case of Chamberlain and Hewitson, H. 7. W. III. Ld Raym.

<sup>g</sup> & Ought. 391, 392, 393.

<sup>h</sup> ib. Burn's Ec. Law, Art Defam.

The husband and wife, by the spiritual law, may not join in suit in that court, as they must do in the temporal; but each shall sue separately upon their own cause of action; but the husband only shall have an action at common law for words spoken against his wife, so also for an assault and battery of his wife,—A husband and wife libelled in the spiritual court for calling the husband cuckold. Holt, c. i. granted a prohibition to stay the suit, because the husband cannot sue in that court for that word with his wife; but the wife only, the imputation being upon her<sup>l</sup>.

Action brought by the husband, stating that the defendant assaulted his wife with an intent to ravish her. Actionable; for though here was only an act intended, and not done, yet an assault with an intent to ravish, is a defamation, and actionable<sup>k</sup>.—Action brought for these words, Thou art a whore, and my husband's whore.—The cause was tried in the sheriff's court in London, and the proof was, that the words were spoken in Clerkenwell, out of the city. And though such words spoken in London are actionable, they are not so out of it. Verdict given for the plaintiff<sup>l</sup>.—Action for these words, She hath married the husband of another woman. The plaintiff averred in his declaration, that he had no other wife. He had a verdict. But the judgment was arrested, because it might be, that his first wife was dead, or that she was beyond sea for seven years, and therefore the case might be out of the stat. 1 J. c. 11. and probably the defendant might mean, that the plaintiff was contracted to another woman. and so in conscience he was her husband<sup>m</sup>.

The following curious case I shall here lay before my readers, being enduced to give it a place in this digest, be-

<sup>l</sup> 3 Salk. 288.

<sup>k</sup> 2 Sid. 76. 100.

<sup>l</sup> 1 Liv. 116.

<sup>m</sup> Allen, 37.

cause it settles a matter of considerable moment, to a body of people very respectable for the consistency and regularity of their public conduct.

Miss Mary Jerom was educated among the Quakers at the town of Nottingham, her parents who lived there being of that persuasion. There are several separate congregations of Quakers in that town, and once a month a general assembly is held of them all. At these monthly meetings, they take into consideration the conduct of such of their members as have not acted conformably to their rules, and proceed according to the direction of our Saviour in the 18th chapter of St. Matthew, v. 15—17, which they call their discipline. If gentle admonitions in private have no effect, complaint is made to the monthly meeting; from whence a deputation is formally sent, to visit and to endeavour to reclaim the party offending. And if these steps prove ineffectual, they proceed at last to a final sentence of expulsion, which is usually by some instrument or paper in writing drawn up for that purpose, and openly read at one of the meetings for public worship. The person employed in this service is called the clerk of the meeting, and the writing by which the society exclude and disown the delinquent as a member of their society, generally sets forth the cause of their proceeding, and the fruitless care and endeavours of the society to reclaim. This has been their general practice since the toleration act. Mary Jerom having acted in disobedience to their rules, by frequenting places of public diversions, going into mourning for the death of a relation, and doing other things which they esteem unlawful; the method of admonition and visitation by deputies was taken by the society; and several conferences were had, but they proved ineffectual; and she absented herself from their meetings, and declaring that she did not look  
upon

upon herself as one of their body, the society at last (after several fruitless attempts to reclaim her for a year and a half) proceeded in their usual way to the sentence of expulsion, in the following words; which were reduced into writing, approved of by the monthly meeting, and afterwards read by the clerk of the meeting, at the close of their public worship at Nottingham, on Sunday, September 5, 1761.

“Whereas Mary Jerom, of this town, was born of parents professing the same religious principles with us, and by them educated in our society; but not duly regarding the truth we profess, she imbibed erroneous notions contrary to scripture doctrine, and in diverse parts of her conduct acted very inconsistently with a life of self-denial; and of late years mostly neglected meeting for divine worship; and when visited by friends appointed by our monthly meeting, in love to her soul, and in order to reclaim her from error, and bring her to the acknowledgment of the truth both in judgment and practice; but rejecting our labour of love, she declared that she did not look upon herself as a member of our society: We therefore hereby declare her not in unity with, nor a member of our religious society, until by unfeigned repentance she duly acknowledge scripture doctrine, and behave agreeable to our holy profession; which that she may see most sincerely desire. Signed in and by order of our monthly meeting held at Nottingham the 5th of the eighth month, 1761, by Francis Hart, clerk.”

Miss Jerom being acquainted with this proceeding, sent her maid servant to the clerk for a copy of this sentence; who accordingly transcribed it, and enclosed it in a cover directed to Mrs. Mary Jerom; who, being thus possessed of it, annexed it to an affidavit, and applied to the court of King's Bench for an information for a libel. But the court rejected the motion, and refused to grant a rule to show cause. She

after-

afterwards, on the 12th of March, 1762, preferred a bill of indictment against Francis Hart for a libel, before the grand jury at the assizes held for the county of Nottingham. Which bill being found by them, was afterwards removed by certiorari into the King's Bench; and Francis Hart, the defendant, having pleaded not guilty, it was tried before Mr. justice Clive, at the summer assizes held for the town of Nottingham, July 30, 1762. The evidence on the part of the prosecution was, the prosecutrix, and her maid servant who went for the paper; and the evidence of the publication of it as a libel was, the direction of it to the prosecutrix, and the defendant's acknowledgment to the maid that he read it at the meeting. The defendant's council called no witnesses; being of opinion, that the Quakers, who were the only persons that could give an account of their method of proceeding, were disabled by the statute of 7 & 8 W. c. 34. from being witnesses on a criminal prosecution; and being restrained from arguing that the paper in question was no libel by the judge, who said that such a question was more proper to be determined by the court above, they could only insist, that the evidence on the part of the prosecution was not sufficient to maintain the indictment. The judge left the case, with its circumstances, to the jury, but rather recommended it to them to acquit the defendant. The jury, after being withdrawn about three hours, found the defendant, Francis Hart, guilty. In the Michaelmas term following, Mr. Cust moved the court of King's Bench for a new trial, and after stating the above-mentioned facts, and observing upon the circumstances of hardship which would attend the case, on a motion in arrest of judgment, where no facts could be relied on but what appeared in the record; and after a verdict, it might be presumed that a malicious intention to defame the prosecutrix (which was charged in the indictment) was proved, insisted that

that the leaving such a case to a jury, would be enabling a jury to set up a judgment in opposition to the legislature, and overturn the toleration act; and that therefore the verdict ought to be set aside as a verdict against law. The court was clearly of opinion, that the jury should have been directed to acquit the defendant; and as notice of the motion was given, and council appeared for the prosecution, who did not contradict the abovementioned facts, the court said they would not do so much credit to such a prosecution as to grant a rule to shew cause; and they ordered the verdict to be set aside, and a new trial to be had on the first motion<sup>a</sup>. Note, The solemn affirmation of Quakers is by the above cited act admitted in all civil cases where an oath is allowed or required, instead of such oath; and whenever any act of parliament requires an oath to be administered, this exception, in respect of Quakers, is to be understood, although no reservation is had for them expressly in the act. But this exception does not extend to evidence given in criminal causes, therefore the solemn affirmation of a Quaker could not have been admitted to enable a witness to be examined in the above cause. No Quaker is permitted to serve upon a jury, or to bear any office or place of profit in the government<sup>o</sup>. Before I quit this article, it may not be improper to take notice of the following singular law.

*Punishment for a common Scold.*

**A** Common scold, or communis rixatrix, is considered in the eye of the common law, as a public nuisance to her neighbours, for which offence she is indictable; the form of which indictment does not require the particulars of her offence to be set forth, but the offence must be signified with

<sup>a</sup> Burn's Ecc. Law, Art. Dissenters.      <sup>o</sup> 13 & 14 W. c. 4. 8 G. I. c. 6.  
23 G. II. c. 46. sect. 36, 37.

convenient certainty, and the indictment must conclude not only *against the peace, but to the common nuisance of divers of his majesty's liege subjects*. A case of this kind happened H. 19 Geo. II. K. & M. Cooper, on an indictment for being *a common and turbulent brawler, and sower of discord against her quiet and honest neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes amongst his majesty's liege people, against the peace, &c.* on which indictment she was convicted<sup>r</sup>. The punishment for this crime, is to be placed in a certain engine of correction, called a trebucket, cucking-stool, or castigatory, though now frequently corrupted into ducking-stool, because her further judgment is, to be placed therein, and plunged into the water<sup>q</sup>. Lord Coke says<sup>r</sup>, that *cuck* or *quck*, in the Saxon tongue, signifies to scold or bawl; taken from the bird cuckow, or quckhaw; and *ing* in that language signifies water, because a scolding woman was for her punishment sowed in the water. And Mr. Burn remarks<sup>s</sup>, that the common people in the northern parts of England, amongst whom the greatest remains of the ancient Saxons are to be found, pronounce it *ducking-stool*; which perhaps may have sprung from the Belgick or Teutonick *ducken*, to dive under water; from whence also probably we denominate our *duck*, the water fowl; or rather it is more agreeable to the analogy and progress of languages to assert, that the substantive *duck* is the original, and the verb made from thence; as much as to say, that to *duck* is to do as that fowl does.

But though many men may be stigmatized as *turbulent brawlers*, &c. yet the punishment for committing this kind of nuisance *against his majesty's liege subjects*, is confined to women only, which certainly does no credit either to the justice or gallantry of our ancestors.

<sup>r</sup> Br. 206.<sup>q</sup> 1 Haw. 200.<sup>r</sup> 3 Inst. 219.<sup>s</sup> 3 Inst. 220.



## C H A P. III.

*Of Marriage, as it affects the Person and Condition of Women.*

**M**ARRIAGE is an institution calculated to promote the private happiness of individuals, and the most essential interests of civil society ; by it a man and a woman enter into a compact, and mutually exchange vows, one principal end of which being the procuration of children, the parties bind themselves by such marriage vows, in the presence of God, to educate in a suitable and proper manner, such children as shall be had between them. And in order to cement that affection and endearment, which such a state of union is calculated to produce, it is incumbent both on the man and the woman to observe a chaste fidelity to each other, and neither to disturb their own private peace, and mutual confidence by conjugal infidelity, nor to disgrace the holy institution of marriage, which supplies the honourable and delicate means of gratifying the passion of love, by an unbridled indulgence of foul lust ; by which that decorum and propriety of manners, which is the ornament and basis of civil society, is openly subverted. Indeed marriage seems to have been at first instituted as necessary to the very being of human society : for without the distinction of families there can be no encouragement to industry, nor any foundation for the care of acquiring riches ; and therefore all well-ordered societies have settled the solemnities of marriage, and ordained, that such contracts should continue during the life of the parties, which is absolutely necessary to render the mutual cares of parents uniformly directed to the making provision for their children ; and that the love and respect of their children might be shewn to both parents, without distraction or confusion, which could not be done if

the marriage was to be annulled, and the interests of the husband and wife were to be separated and severed after the concern of education was over. Besides, the interest of marriage could not be conveniently carried on, if there were a prospect that the marriage was any otherwise to be determined than by death only. For each person would be injuriously drawing out of the common stock, to the detriment of their joint concern, and to the prejudice of the education of their offspring. Besides, that such a joint interest cannot be well and commodiously carried on without a mutual friendship and endearment, which must be lessened, and indeed destroyed, by the prospect that the contract might be cancelled by the humour of either party,

The circumstances which must concur to render a marriage legal are, (1.) The consent of the parties marrying; for no compulsive marriages are binding; and, if they are under age, of their parents or guardians. (2.) An ability in the parties to contract marriage. (3.) The marriage must be actually solemnized and consummated. If a boy under fourteen years of age, or a girl under twelve, marries, this marriage is inchoate and imperfect; and when either party comes to the age of consent as aforesaid, the disagreement of either of them is sufficient to make the marriage void, without the interference of the ecclesiastical court. And nothing is more reasonable than that the supposed incapacity of judgment consequent on such tender ages, which in the eye of the law renders contracts of every other kind void, should make void this of marriage, which must be considered as one of the most important contracts possible to be entered into. This is founded on the civil law; but the canon law pays a greater regard to the constitution than the age of the parties; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their ages may be. And in our law it

is

is so far a marriage, that if at the age of consent they agree to continue together, they need not to be married again. If the husband be of years of discretion, and his wife under age, he may disagree, as well as his wife may when she comes to age of consent : for in contracts, the obligations must be mutual, both must be bound or neither ; and so, *vice versa*, when the wife is of years of discretion, and the husband under<sup>s</sup>. The want of a competent share of reason renders a matrimonial contract, as well as any other, invalid ; but what state of mind determines a man a lunatic, and his act of marriage invalid of consequence, has been differently determined. It has been formerly considered, that if an idiot takes a wife, they are husband and wife in law, and their issue legitimate, for he is allowed to be capable of consenting to marriage<sup>t</sup> ; but such doctrine is now deemed irrational<sup>u</sup>. But a modern statute<sup>v</sup> provides, that the marriage of lunatics, or persons under phrenzies, (if found lunatic under a commission, or committed to the care of trustees by an act of parliament) before the lord chancellor, or the majority of the trustees have declared them to be restored to a sane mind, shall be totally void.—It is said that a dumb person may contract matrimony by signs, which shall be available to all intents<sup>w</sup>. According to the ancient law, a christian of either sex marrying with a Jew, was guilty of felony, and liable to be burnt alive, or as others say, buried alive<sup>x</sup>. The consent of parents or guardians is likewise necessary to constitute a legal marriage of minors. Both by the common and canon law, if the parties were of the age of consent, no other concurrence was required. The civil law indeed required the consent of the parent or tutor at all ages, unless the children were emancipated, or out of the parents power ; and if such consent

<sup>s</sup> Co. Lit. 79. <sup>t</sup> 1 Sid. 112. <sup>u</sup> Blackst. Co. b. 1. c. 22, <sup>v</sup> 15 Geo. II. c. 30.  
<sup>w</sup> Swinb. Mat. Con. 5. 15. <sup>x</sup> 3 Inst. 89. Fleta 54.

from the father was wanting, the marriage was null, and the children illegitimate; but the consent of the mother or guardians might be supplied by the judge, if unreasonably withheld; and if the father was *non compos mentis*, a similar remedy was given<sup>1</sup>. These provisions are adopted and imitated by the French and Hollanders, with this difference, that in France the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty-five; and in Holland the sons are at their own disposal at twenty-five, and the daughters at twenty. Thus hath stood, and thus at present stands, the law in other neighbouring countries<sup>2</sup>. But by several statutes it is otherwise provided in this country; for whoever marries any woman-child under the age of sixteen years, without consent of parents or guardians, is subject to a fine, or five years imprisonment, and the wife's estate, during the husband's life, shall go to be enjoyed by the next heir. And a penalty of 100*l.* is laid on any clergyman who marries a couple, either without publication of banns, which is deemed giving public notice thereof to the parents or guardians, or without licence; to obtain which the consent of parents or guardians must be sworn to.—Further, in order to render a marriage legal, neither party must have any incapacity or disability to contract marriage, and such impediments are created either by the canonical or statute law. By the ecclesiastical or canon law, any corporal infirmity which frustrates the end and design of matrimony, if clearly proved to exist, renders a marriage void, although performed in exact conformity to law; and the ecclesiastical court will pronounce such marriage absolutely null and void. But any such corporal imbecility contracted after marriage, is not allowed to operate to the dissolution of the contract.—A pre-contract is by canon law another

<sup>1</sup> Cod. 5. 4. 1 & 20.      <sup>2</sup> Domattit. Douries & Montesq. l'esp. des. Loix 23.  
 Vianius in Inst. l. 1. c. 20.

sufficient ground upon which to annul a marriage. Any contract made *per verba de presenti* ; or in case of cohabitation, *per verba de futuro*, between persons able to contract matrimony, was held valid for many purposes ; and the spiritual court had a power of compelling the parties to celebrate it in *facie ecclesiæ*. At the time of the reformation all impediments to marriage arising from pre-contracts to other persons were abolished, and declared of none effect<sup>a</sup>, unless they had been consummated with bodily knowledge ; in which case the canon law holds such to be a marriage *de facto*, but this clause was repealed by an act passed in the next reign<sup>b</sup>, and such pre-contracts were again rendered lawful bars to any other marriage by either party, notwithstanding a marriage consummated, and issue had thereby, the reason of which is thus given in the act. “ Since  
 “ the time of which act, viz. 32 Hen. VIII. c. 38. although  
 “ the same was godly meant, the unruliness of men hath  
 “ ungodly abused the same, and diverse inconveniences (in-  
 “ tolerable in manner to christian ears and eyes) followed  
 “ thereupon, women and men breaking their own pro-  
 “ mises and faiths, made by the one unto the other, to set  
 “ upon sensuality and pleasure, that if after the contract of  
 “ matrimony they might have whom they most favoured  
 “ and desired, they could be content, by lightness of their  
 “ nature, to overturn all that they had done before, and  
 “ not afraid in manner, even from the very church door  
 “ and marriage-feast, the man to take another spouse, and  
 “ the spouse to take another husband, more for bodily lust  
 “ and carnal knowledge, than for surety of faith and truth,  
 “ or having God in their good remembrance, contemning  
 “ many times also the commandment of the ecclesiastical  
 “ judge, forbidding the parties, having made the contract,  
 “ to attempt to do any thing in prejudice of the same.”—

<sup>a</sup> 32 H. VIII. c. 38.

<sup>b</sup> 2 & 3 E. VI. c. 23.

A prior marriage, either party having another husband or wife living, and not out of the kingdom during seven years, not only renders a subsequent one null and void, but the offending party is guilty of felony, but entitled to the benefit of clergy<sup>c</sup>.—Consanguinity or relationship by blood, or affinity or relationship by marriage, are impediments to marriage derived from the Mosaic law; either there laid down in express words, or inferred by the clearest deduction. Such marriages, as being unlawfully had, are void *ab initio*, on account of some of the causes that have been enumerated, can give no right in any property which is recoverable by the heir at law, and the issues of such spurious marriages are illegitimate; moreover, the ecclesiastical judge has a right of inflicting penance on the offenders. And because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money, it is declared by the statute of Henry VIII. above cited, that nothing, God's law excepted, shall impede any marriage but within the levitical degrees; but in the reign of queen Mary this act was repealed, and the laws respecting marriage put on the same footing as they had formerly been settled by the Romish clergy<sup>d</sup>; but when protestantism was again restored by the accession of queen Elizabeth, the statute of Hen. VIII. was once more put in force, the clause concerning pre-contracts repealed by Edw. VI. alone excepted. And thus stood the laws respecting marriages until the act 26 Geo. II. commonly known by the name of the marriage-act, took place 25th March, 1754. The prohibited degrees of consanguinity, and affinity, are as follow:

<sup>c</sup> 1 Ja. I. c. 11

<sup>d</sup> 1 & 2 P. & M. c. 8. sect. 19.

*Prohibited Degrees of Consanguinity, or Relationship by Blood, as well as of Affinity, or Relationship by Marriage, of the Man's Part.*

A man may not marry his	Conf. 1. grandmother,	—	} second degree in the ascending right line.
	Affin. 2. grandfather's wife,	—	
	Affin. 3. wife's grandmother,	—	
	Conf. 4. father's sister,	—	} second degree in the ascending collateral line.
	Conf. 5. mother's sister,	—	
	Affin. 6. father's brother's wife,	—	
	Affin. 7. mother's brother's wife,	—	
	Affin. 8. wife's father's sister,	—	
	Affin. 9. wife's mother's sister,	—	
	Conf. 10. mother,	—	} first degree in the ascending right line.
	Affin. 11. stepmother,	—	
	Affin. 12. wife's mother,	—	
	Conf. 13. daughter,	—	} first degree in the descending right line.
	Affin. 14. wife's daughter,	—	
	Affin. 15. son's wife,	—	
	Conf. 16. sister,	—	} first degree in the descending collateral line.
	Affin. 17. wife's sister,	—	
	Affin. 18. brother's wife,	—	
	Conf. 19. son's daughter,	—	} second degree in the descending right line.
	Conf. 20. daughter's daughter,	—	
	Affin. 21. son's son's wife,	—	
	Affin. 22. daughter's son's wife,	—	
	Affin. 23. wife's son's daughter,	—	
	Affin. 24. wife's daughter's daughter,	—	
	Conf. 25. brother's daughter,	—	} second degree in the descending collateral line.
	Conf. 26. sister's daughter,	—	
	Affin. 27. brother's son's wife,	—	
	Affin. 28. sister's son's wife,	—	
	Affin. 29. wife's brother's daughter,	—	
	Affin. 30. wife's sister's daughter,	—	

*Prohibited*

*Prohibited Degrees of Consanguinity, or Relationship by Blood, as well as of Affinity, or Relationship by Marriage, of the Woman's Part.*

A woman may not marry with her

Conf.	1. grandfather,	—	} second degree in the ascending right line.
Affin.	2. grandmother's husband,	—	
Affin.	3. husband's grandfather,	—	

Conf.	4. father's brother,	—	} second degree in the ascending collateral line.
Conf.	5. mother's brother,	—	
Affin.	6. father's sister's husband,	—	
Affin.	7. mother's sister's husband,	—	
Affin.	8. husband's father's brother,	—	
Affin.	9. husband's mother's brother,	—	

Conf.	10. father,	—	} first degree in the ascending right line.
Affin.	11. stepfather,	—	
Affin.	12. husband's father,	—	

Conf.	13. son,	—	} first degree in the descending right line.
Affin.	14. husband's son,	—	
Affin.	15. daughter's husband,	—	

Conf.	16. brother,	—	} first degree in the descending collateral line.
Affin.	17. husband's brother,	—	
Affin.	18. sister's husband,	—	

Conf.	19. son's son,	—	} second degree in the descending right line.
Conf.	20. daughter's son,	—	
Affin.	21. son's daughter's husband,	—	
Affin.	22. daughter's daughter's husband,	—	
Affin.	23. husband's son's son,	—	
Affin.	24. husband's daughter's son,	—	

Conf.	25. brother's son,	—	} second degree in the descending collateral line.
Conf.	26. sister's son,	—	
Affin.	27. brother's daughter's husband,	—	
Affin.	28. sister's daughter's husband,	—	
Affin.	29. husband's brother's son,	—	
Affin.	30. husband's sister's son,	—	



The husband and wife being but one flesh, he who is related to one by consanguinity, is related to the other by affinity in the same degree.—Marriages in the ascending or descending line, that is, of children with their father, grandfather, mother, grandmother, and so upwards, are prohibited without limit, because they are the cause immediately, or mediately, of such children's being; and it is directly repugnant to the order of their nature, which hath assigned several duties and offices essential to each, that would thereby be inverted and overthrown. A parent cannot obey his child, and therefore it is unnatural that a parent should be wife to a child. Further, such absolute prohibitions are necessary to prevent the incongruity, absurdity, and monstrous enormity of the relations to be begotten. The son or daughter for instance, born of the mother, and begotten by the son considered as born of the mother would be a brother or sister to the father, but as begotten by him, would be a son or daughter. So the issue procreate upon the grandmother, as born of the grandmother, will be uncles or aunts to the father; but as begotten by the son, they will be sons or daughters to him, and this in the first degree of kindred<sup>c</sup>. And though the idea of a man marrying his grandmother seems at the first view to be rather ridiculous, yet it is very far from being out of the course of nature to suppose it possible, and that there might be issue by such incestuous marriage. Suppose, for instance, a woman marries at twelve years of age, which she may legally do, and that she has a daughter born the next year, who, when arrived at marriageable years, is married, and has a son within a twelvemonth after, that son will be fourteen years old, and may of course marry when his grandmother is forty years of age, who is then very likely, in the course of na-

<sup>c</sup> Gibs. 412.

ture to breed children. However, I cannot find that the Civilians have been much employed in annulling incestuous marriages contracted between men and their grandmother's, or their grandfather's wives; or between women and their grandfather's, or their grandmother's husbands, but an alliance not very remote from such an one happened by a man's marrying the wife of his great uncle, which was declared not to be within the Levitical degrees<sup>f</sup>; but whether a man shall marry his wife's sister, or a woman her husband's brother, has been much agitated. In Michaelmas term 1672, a prohibition was granted out of the King's Bench, against the Spiritual Court, enquiring into a marriage had with a wife's sister, but in the Trinity term following, the point was argued by Civilians before the court, and a consultation was granted. And indeed such marriage is expressly prohibited by 25 Hen. VIII. c. 22. but the doubt arises on the point, whether that act is repealed or not, and there are respectable authorities on either side.

Whether a man might marry his wife's sister's daughter, was determined in the affirmative in the case of Richard Parsons, mentioned by lord Coke, 1 Inst. 235, but that case is said to have been expunged two years afterwards before the king in council; and at Easter Term 1618, the same question arose, and a consultation was granted; and Sir John King then declared it to be the same degree of proximity, as a nephew marrying his father's brother's wife; and this being expressly prohibited, the other by parity of reasoning is so likewise. The same question was again argued, T. 1 Ann, and consultation granted. And bishop Gibson informs us<sup>g</sup>, that soon after the making of the act of 25 Hen. VIII. c. 22.

<sup>f</sup> Case of Harrison and Burwill, T. 20 C. 2. Gibs 413.

<sup>g</sup> Codex, p. 412, 413.

by which marriage is prohibited within this degree of affinity, Thomas lord Cromwell desired a remission for one Massay, who was contracted to the sister's daughter of his former wife, but the archbishop refused it, as contrary to the law of God ; and gave for reason, that as several persons are prohibited who are not expressed, but understood, by like prohibition in equal degree, so in this case, it being expressed that the nephew shall not marry his uncle's wife, it is implied that the niece shall not marry to the aunt's husband <sup>h</sup>,

An uncle cannot marry his niece, which is forbidden by implication by the prohibition that a nephew shall not marry the aunt. The civil law allowed first cousins to intermarry, but the canon law, whose object was to extend prohibitions to marriage arising from consanguinity or affinity as far as possible, that the church might be enriched by granting dispensations, prohibited both first and second cousins. From confounding these two laws, probably arose the vulgar maxim that first cousins may marry, but second cousins may not ; for first cousins may marry by the civil law, and second cousins cannot by the canon <sup>i</sup>, but all such restrictions were done away by act of parliament, 32 Hen. VIII. c. 38.

Affinity is terminated in the husband himself from the wife's kindred, and in the wife herself from the husband's kindred <sup>k</sup>, therefore the kindred of the husband are not of affinity to the kindred of the wife. The husband's brother therefore, or even the husband's son by a former wife, may marry the wife's sister, or the wife's daughter, by a former husband. If a marriage is had within the prohibited de-

<sup>h</sup> Case of Ellerton and Gaffrell, Comyns, 318.

318, 119.

<sup>k</sup> Wood's Civil Law, 119.

<sup>i</sup> Wood's Civ. Law,

degrees of kindred, the issue is not considered by the common law as illegitimate, until a sentence is pronounced in the court Christian to annul the marriage: which sentence is admissible in all the temporal courts, and operates to the bastardizing and disinheriting the children.—A prohibition was prayed to stay a suit in the spiritual court, against a man for marrying with the bastard daughter of his sister, and it was grounded on a plea, that such a marriage is prohibited by no law; for there is neither affinity nor consanguinity in a bastard, who is *nullius filius*. On the contrary it was urged, that the Levitical law is, *ad proximum sanguinis non accedet*; that the Jews made no difference as to marriage between bastards and others. That though bastards are deprived of certain privileges by particular laws, yet the same reason prohibits them from marriage as others, and by this rule a man might marry his own bastard, which doubtless could not be allowed. Lord Raymond, and the court, inclined not to grant a prohibition, but the cause was adjourned, and it does not appear what became of it <sup>1</sup>.

The temporal courts are the proper judges what marriages are within or without the Levitical degrees, and they have a power of prohibiting the spiritual courts, if they impeach any persons for marriage without those degrees.

Marriages had out of due form of law are liable to certain pecuniary fines, which are created by the following statutes. *By the 6 & 7 W. III. c. 6. s. 52. no person shall be married at any place pretending to be exempt from the visitation of the bishop of the diocese, without a licence, except the banns shall be published and certified according to law; and every parson, vicar and curate, who shall marry any persons contrary to the true intent hereof, shall forfeit 100l. half to the king, and half to him*

## RIGHTS AND PRIVILEGES OF WOMEN. 35

*who will sue in any of his majesty's courts of record; and for the second offence, shall be suspended from his office and benefice for three years.*

*And by the 7 & 8 W. III. c. 35. sect. 2, 3, 4. every parson, vicar or curate, who shall marry any person in any church or chapel, exempt or not exempt, or in any other place whatever, without publication of banns, or without licence, shall forfeit 100l.—Every parson, vicar or curate, who shall substitute or employ, or knowingly and wittingly shall suffer and permit, any other minister to marry any persons in any church or chapel, to such parson, vicar or curate, belonging or appertaining, without publication of banns or licence, shall forfeit 100l.—Every man so married without licence, or publication of banns as aforesaid, shall forfeit 10l. to be recovered with costs by him who shall sue. And every sexton, or parish clerk, who shall aid or assist at such marriages so celebrated without banns or licence, shall forfeit 5l.*

*And by the 10 Ann, c. 19. sect. 176. every parson, vicar or curate, or other person in holy orders, beneficed or not beneficed, who shall marry any person in any church or chapel, exempt or not exempt, or in any other place whatsoever, without publication of banns, or without licence from the proper ordinary, shall forfeit 100l. And if such offender shall be a prisoner in any prison or gaol, (other than a county gaol) at the time of such offence committed, and shall be duly convicted thereof; then upon oath made of such imprisonment before one of the judges, and upon producing a copy of the record of such conviction, to be likewise proved upon oath before the said judge, he shall grant his warrant to the keeper of the gaol, or prison, where such offender is a prisoner, to remove him to the gaol of that county where he is a prisoner, there to remain charged in execution with the penalty inflicted by this act, and with all and every the causes of his*  
former

*former imprisonment : and if any gaoler, or keeper of any prison, shall be privy to, or knowingly permit any marriage to be solemnized in the said prison, before publication of banns or licence as aforesaid, he shall forfeit 100l.*

*Of Marriage as it is now regulated by the Marriage Act,*

**S**UCH important regulations as those made by this act, in a matter of such universal concernment as marriage, could not fail of dividing the public opinion, and of being the subject of very warm debate both in the houses of parliament and without doors, while it was passing into a law. It was represented as laying an impassable line between the rich and the poor, and controlling all the emotions of love and genuine affection in youth, by the frigid maxims of avarice and ambition imbibed by age : and if the former frequently betrayed a want of judgment and discernment, the latter as often enforced a splendid and wretched state of legal prostitution ; in which the happiness of the party was sacrificed to family pride. But surely this objection is more specious than real, as the power granted to the parents by this act, expires as soon as the child attains to twenty-one years of age ; the restraint is therefore kindly laid on that period of life, when the ebullitions of passion, and impatience of all restraint, are least suppressed by the efforts of reason, assisted by its best coadjutor experience.—It was likewise argued on another ground, as tending to repress that ardour in the poor, which impells them to marriage, by impeding the ceremony to such as could not purchase a licence, by making the publication of banns on three succeeding Sundays, indispensibly requisite to all such ; and it was observed, that whatever procraftinates a legal marriage, has a proportionable tendency to promote debauchery and lewdness. And perhaps this is its weak side.—Some there were who urged, that the  
regula-

regulations established by this act, would put it in the power of designing men to delude innocent girls by an illegal marriage; but on this account it should seem, that no solid objection can be made. Indeed, certain forms in the solemnization of marriage, are thereby made absolutely necessary to constitute a legal marriage, which before did not affect such a contract; but they are in their nature so plain and intelligible, that to be once heard they must be ever after known and understood; and it is the interest of the clergyman, as much as of the woman, to see the banns are properly authenticated before he performs the ceremony; whereas at the same time, the act removed the most fruitful resource to supply knaves with the means of practising upon unsuspecting innocence, I mean pre-contracts. By compelling the parties to solemnize marriage in the face of the church, upon satisfactory proof being given to the judge of a pre-contract, a woman had indeed a remedy at law against her seducer; but then such engagements not being of public notoriety, perhaps known to none but the parties themselves, the most fatal imposition might be practised on another woman, by marrying her, notwithstanding such an impediment. It is true, the impostor was liable to a criminal action on the statute of James I. against bigamy; but after the deluded woman had followed her betrayer through the process of an indictment, and had brought his guilt home to him, thereby doing the utmost violence to every delicate sensation, her recompence was, the stigma of having cohabited with an adulterer, not with a legal husband; and to find her children branded with illegitimacy. Such might be the consequences attending pre-contracts actually made; but how easy it was to get rid of a wife, by colluding with a woman to claim the fulfilment of an imaginary pre-contract, the numerous instances where such tricks have been practised sufficiently shew.—The law now, by denying wo-

men redress by marriage, when they have incautiously yielded to the importunity of a lover, thereby guards them in the most effectual manner against the artifices of seduction. I argue concerning the propriety of pre-contracts, upon the presumption of such having been made to delude a woman of her virtue, because that is certainly their most defensible ground; though doubtless many were given without such indirect views being either proposed or obtained thereby. And the law now allows a woman to bring an action on the case, to recover damages upon a pre-contract, which will be explained more fully in the second book; and a very learned lawyer expresses a doubt, whether by the act 26 Geo. II. c. 33. the impediment of pre-contracts is entirely abolished, when consummated with bodily knowledge<sup>m</sup>. The marriage act, 26 Geo. II. c. 33. is in substance as follows:

*All banns shall be published in the parish church, or in a public chapel in which banns have been usually published, upon three Sundays preceding the solemnization of marriage: and if the persons to be married dwell in different parishes, the banns to be published in their respective parishes, either in the parish church or chapelry where each of them dwell; and if either of the persons shall dwell in any extra parochial place, having no church or chapel wherein banns have been usually published, then the banns shall be, in like manner, published in the parish church, or chapel, belonging to some parish, or chapelry, adjoining to such extra-parochial place, which publication shall be certified by the parson, vicar, or curate, who publishes such banns, in writing, under his hand, and the marriage shall be solemnized in the same church, or chapelry, in which the banns were published.*

*No obligation is laid on any minister to publish banns of marriage, unless the parties to be married deliver to him a notice in writing, of their true christian and surnames, and likewise their*

<sup>m</sup> Blackst. b. I. c. 15.



*respective abodes, and of the time they have respectively dwelt there.*

*Parents or guardians whose consent is required by law, must signify openly at the time of the publication of the banns a dissent to such marriage, which renders the publication void, and subjects the minister to an act of felony, if he afterwards solemnizes the marriage.*

*Licences must not be granted for solemnizing marriages in any other church, parish, or public chapel, than such as belong to the parish, in which the usual place of abode of one of the parties has been for the space of four weeks, immediately before the granting of such licence, or in an adjoining church or chapel. If one or both of the parties reside in an extra-parochial place, and for the purpose of this act only, all parishes which have no parish church, or chapel, belonging to them, or none wherein divine service is usually performed every Sunday, are to be deemed extra-parochial places.*

*This act has no relation to the power of the archbishop of Canterbury and his proper officers, of granting special licences, the right of doing which they derive from statute 25 Hen. VIII. c. 21. sect. 4 & 8.*

*All persons solemnizing marriage in prisons, or in a place so appointed, without the publication of banns or licence, are adjudged guilty of felony, and shall be transported for fourteen years. The prosecution for which offence must be commenced within the space of three years after the offence committed; and all marriages solemnized in any other place than a church or public chapel, unless by special licence, or without publication of banns or licence of marriage, are rendered null and void.*

*In marriages preceded by publication of banns, no proof of residence for four weeks immediately before such solemnization shall be required: but all marriages solemnized by licence, where either of the parties shall be under the age of twenty-one years, unless a widow or widower, which shall be had without the consent of the father of such party so under age, if then living, first obtained, or if dead, of the guardian or guardians; or if none such, then of the mother if living, and a widow [and it may be presumed not having married since the decease of her husband, by whom she had the issue in question]; or if none such, then of a guardian or guardians, appointed by the court of chancery, shall be absolutely null and void.*

*But if any of the persons above enumerated, in whom the right properly vests, shall be non compos mentis, or beyond the seas, or withhold their consent to a proper marriage, the lord chancellor may authorise such marriage by petition preferred, and due proof given of the propriety of such marriage; which authority shall be deemed equivalent to the consent of the person or persons, entitled by relationship or connection with the parties to give it.*

*All contracts of marriage are not obligatory, whether made per verba de presenti, or per verba de futuro.*

*Registers of marriage shall be kept in each parish church or public chapel.*

*All marriages to be solemnized in the presence of two or more witnesses, besides the minister who celebrates the same; and the entry in the register must be signed by the parties married.*

*False entries in such marriage registers, or alterations knowingly and wilfully, with an intent to elude the force of the act, or forging a marriage licence, or a wilful destruction of any marriage*

*marriage register, any such offence to be punished with death, without benefit of clergy.*

*The marriage of the royal family not included in this act.*

*The act does not extend to Scotland, nor to any marriages among the people called Quakers, or amongst persons professing the Jewish religion, where both the parties to such marriage shall be either Quakers, or Jews, nor to any marriage beyond the seas.*

### *Of the Solemnization of Marriage.*

**I**N all places where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place; and no licensed marriage shall be solemnized in any other church or chapel than where the usual place of abode of one of the parties hath been for the space of four weeks next before the granting such licence; and it is required by canon 62, that all marriages by licence, be solemnized between the hours of eight and twelve in the forenoon, and in time of divine service.—Persons contracting matrimony, and causing the same to be solemnized, knowing any canonical impediments in that behalf, or having strong presumption thereof, shall, *ipso facto*, incur the sentence of the greater excommunication<sup>n</sup>.—If any one at the time of marriage, alledges and declares any impediment why the parties may not be accoupled in matrimony, by God's law, and the law of this realm, and will be bound, and sufficient securities with him, to the parties, or else put in a caution (to the full value of such charges as the parties to be married do thereby sustain) to prove his allegation; then the solemnization must be deferred until such time as the truth be

tried °.—It seems in former times, the ring used in the ceremony of marriage, was not gold but iron, adorned with an adamant. The metal hard and durable, signifying the duration and perpetuity of the contract; and Swinburn says, “it skileth not at this day what metal the ring be of, the form of it being round, and without end, doth import that their love should circulate and flow continually.” The finger on which this ring is to be worn is the fourth on the left hand, next to the little finger, because there was supposed a vein of blood to pass from thence into the heart P.—All marriages are deemed clandestine, that are not solemnized in a church or public chapel, wherein banns have been usually published, except by licence from the archbishop of Canterbury. And even marriages so solemnized in a church or chapel, without due publication of banns or proper licence obtained, are alike rendered void, and subjects the person who solemnizes it to felony, punishable by transportation for fourteen years, instead of a fine to which he was formerly liable, as well as his assistants.—A doubt, says Dr. Burn, has been made in what manner a marriage celebrated by virtue of a special licence from the archbishop of Canterbury, shall be registered, especially where the marriage is solemnized in a private house, and by a clergyman not being the incumbent of the parish, if the incumbent refuses to permit the same to be entered in the parish register. But the doubt seems to be solved by the words of the act itself. The register book of marriages is the goods of the parish, and consequently the churchwardens, and not the minister, ought to have the keeping thereof; and the act says, *all marriages celebrated in any church or chapel, or within any such parish or chapelry, shall be entered in such register; and therefore if the churchwardens shall refuse to produce*

° Rubr.

P Swinb. Mat. Cont. sect. 15.

the register-book for that purpose, they may be compelled thereto by legal process. For where a thing by an act of parliament is required to be done, that also is required, without which the thing itself cannot be done.

To make a false entry in a marriage register, to alter it when made, to forge or counterfeit such entry, or a marriage licence, or to aid and abet such forgery; to utter the same as true, knowing it to be counterfeit, or to destroy or procure the destruction of any register, in order to vacate any marriage; any or each of these offences, knowingly and wilfully committed, subject the party to the guilt of felony, without benefit of clergy. And although there is no penalty specified in the act against the minister, for neglecting properly to make the entry in the parish register, yet he is liable to whatever punishment, by fine and imprisonment, a court may think proper to inflict, upon an action by indictment, or information: for, says the accurate Dr. Burn, "it is a great mistake in many persons, who suppose, where an act of parliament inflicts no special penalty for disobedience, that they may transgress such act without any danger of being called to account; whereas nothing is more certain, than that where an act appointeth no particular punishment, the offender is liable to be punished by fine and imprisonment, upon indictment or information, at the discretion of the court. So that an act inflicting no penalty, is in the highest degree penal, so far as a man's liberty or property can be affected."

*Cases determined upon the Marriage Act.*

ON an appeal to the court of King's Bench, from a court of sessions, the question was, Whether the marriage of John and Susannah Meredith was sufficiently proved.

<sup>9</sup> Ecc. Law, Art. Marriage.

<sup>r</sup> Ecc. Law, Art. Marriage.

—One witness made oath, that he and another witness were present on the seventh day of February, 1758, when a marriage was solemnized in the parish church of St. Devereux, between the said John and Susannah Meredith, by the minister of the said parish, by banns. And it appearing to the said sessions, that the entry of the said marriage, in the register book of the said parish, was made in manner following, viz. “ 1758, John Meredith, and Susannah Jenkins, were married by banns,” but neither the minister, parties, nor witnesses, signed the said entry, and that no other entry of the said marriage was ever made.—They therefore were of opinion, that the marriage was not legally proved. On shewing cause, it was urged in support of their opinion, that this appeared upon the state of the case to be a void marriage. For although the omission of banns was originally only an offence against the ecclesiastical law; and even after the 7th & 8th W. III. c. 35. sect. 2. the minister, and clerk, and man married without licence or banns, were only subject to a penalty; yet since the act of the 26 Geo. II. c. 33. an entry of this properly signed, is become so essential a circumstance, that without it the marriage itself is null and void. But the court were of a different opinion. Lord Mansfield said—It was not incumbent on the persons married, to prove that the banns were published, nor does the entry directed to be made, affect the validity of the marriage. But at the same time he declared, that it was a matter of great public concern, for the preservation of pedigrees (which were now become very difficult to prove): and the entry ought to have been made according to the directions of the act. He went so far as to declare, that an information ought to be granted by the court against the minister for omitting it, if it should clearly appear, that it was owing to his neglect; and that such information should be prosecuted by the attorney-general, at the king’s expence, which

which he did not doubt would be readily directed, upon the recommendation of the court. And he ordered the fact to be further enquired into—and it came out, that a regular entry had been made, and that which was produced to the justices, was only a minute or memorandum. So the minister was justified \*.

Two justices removed Edward Young, Rebecca his wife, and Mary their child, from Chilham, to Preston, near Faversham, both in Kent. And the sessions confirmed in all points the order of the two justices.—The case, as stated to appear to the sessions was, that the said Edward Young, being legally settled in Preston, and not being then a widower, was on the 25th day of January, 1758, without the consent of his father, who was then living, married by licence, in the parish church of Tenham, to Rebecca Drury, who was settled in the said parish of Tenham, and who is removed to Preston by the said order, as the wife of the said pauper ; the said Edward Young being then an infant of twenty years. And that afterwards, the said Rebecca was brought to-bed in the parish of Chilham, of the said Mary, removed by the order.—Mr. Knowler, who was to have shewn cause in the court of King's Bench against quashing these orders, opened, that the words of the act were so strong, that he could not get over them, being, *that the marriage should be absolutely null and void to all intents and purposes whatsoever* : unless he said the court should think a declaratory sentence to be necessary. But Mr. Robinson, on the same side, urged in support of these orders, that the word *void* in the act, may be construed voidable ; and that it is highly unreasonable, that a virtuous young woman, and her innocent children, should be turned adrift, and be considered as a whore and bastards, without having any opportunity to contest so severe a judgment against them ;

\* Case of Devereux & Much Dewchurch, E. 2 G. III. Burrow's Set. Ca. 506.  
therefore

therefore that this marriage ought be avoided by a sentence in the ecclesiastical court ; and not in a collateral method, by an *ex parte* order of justices, made without hearing them, or any person on their behalf.—By lord Mansfield, c. j. this point will admit of no manner of doubt. [And he took the distinction between acts of parliament made against one of the parties, and for the benefit of another of the parties, and where such other party has an election either to take the benefit of it or not ; and acts of parliament made against both.] This is not like the statute of bigamy, 1 J. c. 11. which was made only against one of the parties ; but it is an act made against both ; and the marriage is thereby expressly declared absolutely null and void to all intents and purposes whatsoever. And by the whole court—Let the orders be confirmed as to the man, but quashed as to the woman and child. And judge Foster added, that this act was not only made against the husband and wife, but against the innocent children of both ; and he said it would be against the spirit of the act to understand it otherwise, than that the marriage should be absolutely void †.

Marriages had, contrary to the regulations made by the act, will be annulled by the spiritual court, and the first suit that ever was brought upon the marriage act, to avoid the marriage by reason of minority, where the party under age was married by licence without the consent of parents, was by a suit of jactitation. Frost against Waldeck in 1760,

The proviso in the marriage-act, sect. 18. which enacts, that the same shall not extend to that part of Great Britain called Scotland, seems to have been extended further in practice than can be supposed to have been the intention of the legislature. There may be good reason for not extending the restrictions laid upon marriage, to such as shall be

† Case of Chilham and Preston, in 33 G. II. Burrows, Set. Ca. 486.



*bona fide*, and without fraud, had, and celebrated in Scotland; but it is plainly eluding the act for an Englishman and an English woman just to pass over the borders into the Scottish territories, and there intermarry, without either banns or licence, or other pre-requisite; nay, even a clergyman is not essentially requisite, for the parties own servant, whom they carry along with them, or the host at the inn where they shall be, may be sufficient as to the validity of the marriage, although not as to all the legal fruits and effects of it.

*Of the Validity of Marriages.*

THE municipal laws of this country consider marriage in no other light than as a civil contract; the holiness of that state is a matter before the spiritual courts only. Husband and wife are stiled in our law books, *baron & feme*, and a married woman is frequently called *covert baron*, or, what is the present general appellation, a *feme covert*. The disabilities to marriage which our courts of law regard, as they are considered there rather on account of the civil inconveniences they draw after them, than on account of their moral turpitude, will be enlarged upon more properly when we come to treat of marriage as it respects the property of individuals; only it is proper to observe here, that all civil disabilities make the contract void *ab initio*, and not merely voidable; therefore they may be pleaded at any time, even after the death of the parties, which mere ecclesiastical disabilities cannot, without sentence of court duly obtained. No civil disabilities dissolve a contract formed, but only render the parties incapable of forming any contract at all. It does not put asunder what God has joined together, but previously hinders the junction. And if persons legally incapacitated, come together, it is a meretricious, and not a matrimonial union.—It is held to be essential to marriage that

that it be performed by a person in orders<sup>u</sup>, though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini*: it being said that pope Innocent the Third was the first who ordained the celebration of marriage in the church<sup>v</sup>, before which it was totally a civil contract. And in the times of the civil wars, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by stat. 12. Car. II. c. 33. But as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto* void, that is celebrated by a person in orders,—in a parish church or public chapel (or elsewhere by special dispensation)—in pursuance of banns or a license,—between single persons,—consenting,—of sound mind,—and of the age of twenty-one years,—or of the age of fourteen in males, and twelve in females, with consent of parents or guardians, or without it in case of widowhood. And no marriage is voidable by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of consanguinity, or affinity, and corporal impotency, subsisting previous to the marriage.

The lawfulness of marriage is to be tried by the bishop's certificate, upon an issue, *accoupled in lawful matrimony or not*, as in a writ of dower, appeal of bastardy, or the like<sup>w</sup>. Upon appeal to the court of delegates it appeared, that Haydon, and Rebecca his wife, were Sabbatarians, and were married by one of their ministers in a Sabbatarian congregation; the form of the common prayer book was used, except the ceremony of the ring. They lived together as man and wife for seven years, and then Rebecca died, whereupon Haydon took out letters of administration to her.

<sup>u</sup> Salk. 139.<sup>v</sup> Moor, 170.<sup>w</sup> 1 Inst. 134.

But Gould, and Margaret his wife, who was sister to Rebecca, sued a repeal, suggesting that Rebecca and Haydon were never married. And it appearing that the minister who married them was a mere layman, and not in orders, the letters of administration that had been granted to Haydon, as her husband, were repealed, and a new administration granted to the said Margaret Gould, her sister. And this sentence upon an appeal was confirmed by a court of delegates. For it was held, that as Haydon demanded a right to himself, as husband, by the ecclesiastical law, he ought to prove himself a husband by that law. And so the court ruled. And a case was cited out of Swinburn, where such a marriage had been ruled to be void, as to the privileges attending legal marriages. But it was doubted whether the wife, being the weaker sex, or the issue of such a marriage, who are in no fault, may not be entitled by such marriage to a temporal right, although the husband himself, who was in fault, should never intitle himself by the mere reputation of a marriage without right<sup>x</sup>.—But in the case of Mr. Fielding, who was married by a Romish priest to Mrs. Wadsworth, it was held to be a legal marriage, and to subject him to an act of felony by marrying afterwards with the duchess of Cleveland<sup>y</sup>.—And where a wife sued in the spiritual court for alimony, and the husband was an Anabaptist, and although he had a licence from the bishop to marry, yet he married this woman according to the forms of their own religion. Upon the husband praying a prohibition to stay the suit of his wife, Holt c. j. said, that by the canon law a contract *per verba de presenti* is a marriage; so is a contract *per verba de futuro*, if the contract be executed, and he does take her; this is a marriage, and they cannot punish for fornication, but only for not solemnizing the marriage ac-

<sup>x</sup> T. 9 Ann, Case of Haydon and Gould, 1 Salk. 119.

<sup>y</sup> Read *in* Mar.

cording to the forms prescribed by law, but not so as to declare the marriage void <sup>z</sup>.

The principle on which the last mentioned case was determined in favour of the marriage, and that of Haydon against it, is perfectly consistent. In the one the parties were each living, and might be compelled to supply the defects of form which accompanied their marriage. In the other case, one of the parties being dead, such defects could not be supplied. But by the 26 Geo. II. c. 33. the law is entirely new modelled in such cases. But whether a woman is feme covert, or whether she is the wife of such a person, is triable by a jury upon such an issue. Therefore a marriage *de facto*, or in reputation, (as among the Quakers) hath been allowed by the temporal courts to be sufficient to give title to a personal estate, because the lawfulness of marriage is not in issue, or the point to be tried. For the issue is, whether a marriage was contracted between the parties or not; or whether the parties lived in a married state, where the legality of it doth not come in question <sup>a</sup>.

The proof of marriage may be, by witnesses who were present at the solemnization, by cohabitation of the parties; by public fame and reputation; by confession of the married persons themselves, although their acknowledgment may only be to avoid the punishment of fornication; and by divers other circumstances; which if they amount to half proof, ought to be extended in favour of marriage, rather than contrary to it; but now by the marriage-act the register book seems to be intended as a proper, although not the only evidence in this matter; for if there shall be any

<sup>z</sup> Wigmore's Case, 5 Anne, 2 Salk. 438.

<sup>a</sup> Wood, b. 1. c. 6.

doubt as to the identity of the persons, or the like, the register in this respect can be no evidence at all <sup>b</sup>.

*Of Popish Marriages.*

**E**VERY man being a Popish recusant convict, who shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the church of England, by a minister lawfully authorized, shall be disabled to have any estate of freehold in any lands of his wife, as tenant by the courtesy; and every woman being a Popish recusant convict, who shall be married in other form than as aforesaid, shall be disabled, not only to claim any dower of the inheritance of her husband, or any jointure of the lands of her husband, but also of her widow's estate and frankbank, in any customary lands whereof her husband died seised, and likewise be disabled to have any part of her husband's goods: and if any such man shall be married with any woman otherwise than aforesaid, which woman shall have no lands whereof he may be entitled to be tenant by the courtesy, he shall forfeit one hundred pounds, half to the king, and half to him that shall sue in any of the king's courts of record <sup>c</sup>; and if they shall be married in England, other than in a church or public chapel, (unless by special licence from the archbishop of Canterbury) or without publication of banns or licence, the marriage shall be void <sup>d</sup>.

<sup>b</sup> Wood's Civ. Law, 122. Burn's Ec. Law, tit Mar.      <sup>c</sup> 3 Ja. I. c. 5. s. 13;  
<sup>d</sup> 26 Geo. II. c. 23.

## C H A P. IV.

*Of Husband and Wife.*

**A**N husband and wife are justified in rendering to each other mutual defence in case of an attack, either in their person or property. It is lawful in such cases to repel force by force, and the breach of the peace which happens, is chargeable on him only who began the affray. For the law in this case respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers, that the future process of law, is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty, outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence therefore, as it is justly called the first law of nature, so it is not, neither can it be in fact, taken away by the law of society. But care must be taken, that it exceed not the bounds of mere defence and prevention; for otherwise, the defender becomes himself an aggressor\*.

Notwithstanding the law sets a very high value on the life of a man, yet it excuses him who by misadventure kills another in self-defence, though it is very nice in fixing what is *bona fide* self-defence. The plea of self-defence is

\* 2 Roll's Abr. 546. 1 Hawk, P. C. 131.

allowed to extend to the closest kind of civil and natural relationships, therefore a master or a servant, a parent or a child, an husband or a wife, killing an assailant in the necessary defence of each other respectively, are excused. The assistance rendered by the relation being deemed the same as the act of the party<sup>1</sup>.—If a man surprizes another in the act of adultery with his wife, and immediately kills him on the spot; by the laws of England this is not ranked among justifiable homicides, as it would be in a woman killing a man who was attempting to ravish her, but is called manslaughter. Among the Romans it was considered as warrantable, or in some measure blameable, according to the place where the fact was committed. If the adulterer was surprized in the husband's own house, it was deemed perfectly warrantable: but now that distinction does not subsist; but the law makes it manslaughter; though in consequence of the high provocation given, the court directs the sentence of burning in the hand to be very gently inflicted.

### *Abduction of a Wife.*

**TAKING** a wife away from her husband, is commonly called in the law abduction. This may be done with the consent of the wife, or forcibly and violently. But by whatever means it is brought about, the law always supposes compulsion and force to have been used, because the wife is not supposed to possess a power of consent. The remedy therefore for such a crime is, by writ of ravishment, or action of trespass, *vi et armis, de uxore rapta & abducta*. This action lays at the common law, and therefore the husband shall recover, not the possession of his wife, but damages for taking her away, and the offender is liable to be imprisoned two years, and to be fined at the pleasure of

<sup>1</sup> 1 H. P. C. 484.

the king. Both the king and the husband may therefore have this action. And the husband is likewise entitled to recover damages on an action on the case, against such as persuade and entice the wife to live separately from him, without any sufficient cause. The old law was so strict in this point, that if a man's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted, or in danger of being lost or drowned. But a stranger might carry her behind him on horseback, to market, to a justice of the peace, for a warrant against her husband; or to the spiritual court to sue for a divorce<sup>s</sup>.

*Recaption of a Wife.*

**A** MAN may lawfully own and retake his wife or child wherever he finds them; but this act of recaption must not be done riotously, or in a manner which occasions a breach of the peace. And unless such a power was granted to an husband or parent to do himself justice by his own mere act, without the intervention of the law, his wife or children might be concealed and carried out of his reach, if he had no speedier remedy than the ordinary process of law.

*Settlement of Disputes between Husband and Wife, by Justices of the Peace.*

**A** WIFE may demand surety of the peace against her husband threatening to beat her outrageously, and a husband may also have it against his wife; and in all cases of domestic feuds between a husband and his wife, either party may apply to a justice of the peace, and on a proper representation of their grievances, the justice of the peace is empowered to require sureties for their future good behaviour. But the sureties given by feme-coverts must be by

<sup>s</sup> 3 Inst. 434. Stat. West. 3 Edw. I. c. 13. Bro. Abr. tit. Trespass, 213, 207, 440.



their friends, and not by themselves, for the recognizances entered into on these occasions subjecting the parties to a penalty in case of a forfeiture of them, for a wife to be so bound over, would be nugatory and ridiculous, she being incapable of engaging to pay any debt <sup>h</sup>.

Among the common people, a method is sometimes practised of dissolving a marriage, no less singular than compendious. When a husband and wife find themselves heartily tired of each other, and agree to part; if the man has a mind to authenticate the intended separation by making it a matter of public notoriety, thinking with Petruchio, that his wife is his goods and chattels, he puts a halter about her neck, and thereby leads her to the next market place, and there puts her up to auction to be sold to the best binder, as though she was a brood-mare, or a milch-cow. A purchaser is generally provided before hand on these occasions; for it can hardly be supposed, that the *delicate* female would submit to such public indignity, unless she was sure of being purchased when brought to market. To the highest bidder, the husband, by delivering up the end of the halter, makes a formal and absolute surrender of his wife, and, as he imagines, at once absolves her and himself from all the obligations incident to marriage!—Although there are none so high as to be above the notice of the law; yet it should seem by this instance, there are some so low as to disregard its notice, thinking mutual consent law enough to set them free, little dreading remorse of conscience, and less the anathemas of the church.

In a cause in the court of Chancery it appeared, that a man had formally assigned his wife over to another man, and lord Hardwicke directed a prosecution for

<sup>h</sup> 2 Str. 1207. 1 Haw. 126. Crom. 118.

that transaction, as being notoriously and grossly against public decency and good manners.

The court of King's Bench has a power in certain cases to decree a separation; as in the case of the king against earl Ferrers, T. 31 George II. Two successive writs of Habeas Corpus had been issued out of the court of King's Bench, commanding Laurence Earl Ferrers to bring up the body of his countess, (sister to Sir William Meredith) that she might receive the protection of the court against the said Earl, and swear the peace against him if she should think proper, both of which the earl neglected to obey. Some difficulties having been started by members of both houses concerning the privilege of peerage, and whether the court of King's Bench could issue an attachment against a peer during the sitting of parliament, and execute it upon him, for a contempt of their court, Sir William Meredith judged it prudent to petition the house of lords for their leave to proceed against the earl. The petition was faintly opposed, but lord Mansfield, and lord Hardwicke, spoke strongly and particularly; and produced many precedents in proof of the doctrine laid down; in which they were supported by the duke of Argyle. The house came to a resolution, which was ordered to be entered on their journals, viz. 7th Feb. 1757, "It is ordered and declared, that no peer or lord of parliament hath privilege against being compelled by process of the courts of Westminster-hall, to pay obedience to a writ of Habeas Corpus directed to him." And this resolution was confirmed by a subsequent one to the same purport, on the 8th of June following. In consequence of which an attachment was granted against him. Upon which he permitted his countess to come into court, and she exhibited articles of the peace against him, and the earl was obliged to enter into recognizances, himself in 5000l. and two sureties.

ties in 2500l. each <sup>b</sup>. And in the next term, the king against Mary Mead, in the King's Bench. An Habeas Corpus having issued at the instance of John Wilkes, Esq; to bring up the body of Mary Wilkes, wife of the said John Wilkes, and daughter of the said Mary Mead; Mrs. Mead brought her into court. The substance of the return was, that her husband, having used her very ill, did in consideration of a great sum which she gave him out of her separate estate, consent to her living alone, executed articles of separation, and covenanted under a large penalty never to disturb her or any person with whom she should live: that she lived with her mother at her own earnest desire; and that the writ of Habeas Corpus was taken out with a view of seizing her by force, or some other bad purpose. The court held this to be a formal renunciation of his marital right to seize her, or force her back to live with him; and they said, that any attempt of the husband to seize her by force and violence would be a breach of the peace. They also declared, that any attempt made by the husband to molest her on her return from Westminster-hall, would be a contempt of the court. And they told the lady she was at full liberty to go where, and to whom she pleased <sup>i</sup>.—Ann Gregory, the wife of Abraham Gregory, was brought up to the court of King's Bench, upon a writ of Habeas Corpus, directed to her mother and uncle, which had issued at the application of Abraham Gregory her husband. She appeared to have been very ill used by her husband, and to have thereupon fled from him, and come to the defendants for security and protection. And she was ready to swear, and actually did swear the peace against him.—The court would not order her to be delivered to her husband, as his council demanded, but on the contrary told her, she was at liberty to go where she thought

<sup>b</sup> Burrow's Rep. 63r.

<sup>i</sup> Burrow's Rep. 542.

proper, and offered her, and at her request gave her a tipstaff to secure her from any insult on her return to her friends<sup>k</sup>.

*The Evidence of Husband and Wife.*

**T**HEY cannot be evidence for one another, as being one and the same person in affection and interest; it being therefore in a manner giving evidence for themselves, and regularly the one is not admitted to give evidence against the other; nor the examination of the one be made use of against the other, on account of the implacable dissention that might be caused by it, and the great danger of perjury from taking the oaths of persons under so strong a bias, and the extreme hardship of the case. But in criminal cases, where the woman is the party grieved, she may be an evidence against her husband, as in the lord Audley's case, who held his wife while his servant, by his command, ravished her: or where a man is indicted for a forcible marriage, on the statute of 3 Hen. VII. (of which see cases in the third part) or where either a husband or wife have cause to demand sureties of the peace against the other<sup>l</sup>. A woman is not bound to be sworn, or to give evidence against another in case of theft, if her husband be concerned, though it be materially against another, and not directly against her husband<sup>m</sup>. If a feme covert acknowledge any thing at a trial, which is for the present advantage of her husband, but is for her own future disadvantage, this is no good evidence to a jury; for her husband's advantages are likewise her's, and are supposed to be more influential than her future disadvantages<sup>n</sup>.—On an indictment prosecuted by the husband for seducing away his wife, and keeping her some time in adultery, the wife was admitted to be a witness against the defendant.—A wife may be a wit-

<sup>k</sup> M. 7 Geo. III. 4 Bur. Mansf. 1991.

<sup>l</sup> Dalr. 164. 2 Hawk. 431, 432.

<sup>m</sup> 2 Hald's H. 301.

<sup>n</sup> L. P. P. 550.

ness to prove a cheat on her and her husband. The wife of a bankrupt may be summoned before the commissioners named in her husband's commission, and examined, in all matters relating to her husband's affairs; and in case she shall refuse to answer, or shall not answer fully to any lawful question, or shall refuse to subscribe such examination, the commissioners may commit her to prison, without bail, till she make and sign a full answer; the commissioners specifying in their warrant of commitment, the question so refused to be answered. And any gaoler permitting her to escape, or go out of prison, shall forfeit 500l. to the creditors<sup>o</sup>.

### *Action for beating a Man's Wife.*

**FOR** all kinds of ill treatment of a married woman, but particularly beating of her, the law provides a remedy by action of trespass *vi et armis*, to recover damages; which must be brought in the names of the husband and wife jointly. But if the beating or other mal-treatment be very enormous, so that thereby the husband is deprived at any time of the company and assistance of his wife, the law then gives him a separate remedy by an action upon the case for this ill usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages<sup>p</sup>. But a wife cannot recover damages for the beating of her husband, as she hath no separate interest in any thing during her coverture; yet the wife, in case her husband be slain, has a peculiar species of criminal prosecution allowed her, in the nature of a civil satisfaction, which is called an appeal, the nature of which is explained in the third part of this work.

<sup>o</sup> Black. Co. b. 2. c. 31.

<sup>p</sup> Cro. Ja. 501, 538.

*Action for Debt against Husband and Wife.*

**I**N action for debt against husband and wife, for the debt of the wife, if the husband be taken by *capias* or exigent, he shall remain in prison until he put in bail for his wife<sup>q</sup>. If a woman is warden of a prison, and one of the prisoners there marry her, the law adjudges him thereby to be enlarged, deeming it repugnant to all order that he, as her husband, should have the custody of her, and she, as gaoler, the custody of him<sup>r</sup>.

*Of Outlawry.*

**A** Woman that is outlawed is called *waived*, and not *utlagata*. And the reason given by lord Coke for this distinction is, that women are not sworn in leets or tornes, as men of the age of twelve years or upwards are; and therefore men may be called *utlagati*, that is, *extra legem positi*, but women are *waviatæ*, that is, *derilistæ*, left out, or not regarded, because not sworn to the law. And on this account a man under twelve years of age cannot be outlawed<sup>s</sup>. Outlawry is a punishment inflicted on a person for a contempt and contumacy, in refusing to be amenable to, and abide by the justice of that court, which hath lawful authority to call him before them; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so doth it subject the party to diverse forfeitures and disabilities, such as being out of the protection of the king, and the laws of the state<sup>t</sup>. But the nature of the offence for which outlawry is incurred, greatly affects the forfeitures consequent thereon; outlawries

<sup>q</sup> Baron & Feme, 392.<sup>r</sup> Case of Plat, Plow. 17.<sup>s</sup> 1 Inst. 122.<sup>t</sup> Doct. & Stu. di. 2 c. 3. 1 Roll's Abr. 802.

arising both from capital offences, and from personal actions. As to outlawries in treason and felony, the law interprets the party's absence into a sufficient evidence of his guilt; and without requiring further proof or satisfaction, accounts him guilty of the fact. On which ensue corruption of blood, and forfeiture of his whole estate, real and personal. But outlawry in personal actions does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate, but yet it is very fatal and penal in its consequences; for it restrains him of his liberty whenever found, and in the mean time subjects his goods and chattels, and the profits of his lands to seizure; and the sheriff may break open the house of the person outlawed. Outlawry for high treason or felony was in ancient times attended with the most dreadful consequences, for an outlawed person might be as lawfully killed by any one who met him, as a wolf, or any other noxious animal; but in the fourteenth century this general licence was withdrawn; and it was provided, that a person outlawed shall be put to death by the sheriff only, having lawful authority for that purpose.—When the plaintiff would proceed to outlawry against the defendant in a personal action, an original writ must be regularly sued out, and after that a *capias*. If the sheriff cannot find the defendant on the first writ of *capias*, and returns a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former. And if a *non est inventus* is returned upon all of them, then a writ of *exigent*, or *exigi facias*, may be sued out, which requires the sheriff to cause the defendant to be proclaimed, or exacted, in five county courts successively, to render himself; which, if he does, then to take him, as in a *capias*: but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. And

whether the defendant dwells within the same, or another county, than that wherein the exigent is sued out; a writ of proclamation shall issue out at the same time with the exigent, commanding the sheriff of the county wherein the defendant dwells, to make three proclamations thereof, in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place<sup>w</sup>. If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias ut lagatum*, and committed till the outlawry be reversed, which reversal may be had by the defendant appearing personally in court, (and in the King's Bench without any personal appearance, so that he appears by attorney<sup>x</sup>); and it may be reversed by procuring a *superfedeas*, and delivering it to the sheriff before the *quinto exactus*. And any plausible cause, however slight, will be sufficient to reverse it, it being considered only as a process to compel an appearance. Thus if an original record is wanting, or the omission of process or want of form in a writ of proclamation, or a return by a person appearing not to be sheriff, or a variation in the exigent from the original, or by a misnomer, or want of addition, &c.<sup>y</sup> But if the outlawry is by any such means reversed, the defendant must pay full costs, and put the plaintiff in the same condition as if he had appeared before the writ of *exigi facias* was awarded<sup>z</sup>.—An outlawed person may make a will, and have executors and administrators<sup>a</sup>, who may reverse the outlawry of the testator, if in any point illegally obtained<sup>b</sup>. Where process of outlawry issues from the court of King's Bench against husband and wife, and the husband appears, he shall not be admitted to bail until the wife comes in<sup>c</sup>. The wife may not plead to outlawry without her husband, nor plead pardon

<sup>w</sup> 6 H. VIII. c. 4.    <sup>31</sup> E. c. 3.    <sup>x</sup> 4 & 5 W. & M. c. 18.    <sup>y</sup> 2 Hawk. c. 50.    <sup>z</sup> Black. Co. b. 3. c. 19.    <sup>a</sup> Cro. Eliz. 575.    <sup>b</sup> 1 Leon. 325.    <sup>c</sup> Cro. Eliz. 370.



of outlawry without her husband<sup>d</sup>.—For debt due by the wife before marriage the husband was returned outlawed, and the wife waived. But before the return of the exigent, an attorney procured for the wife a writ of *superfedeas*, to stay proceedings against her, on the surmise that she had appeared by him her attorney. But the court was of opinion that the sheriff only could certify her appearance, in which case the exigent should only issue against the husband. But if the sheriff returned the husband taken, and a *non est inventa* for the wife, then an exigent should notwithstanding issue against both, because it is presumed that the husband may bring in his wife<sup>e</sup>. So where process of outlawry continues till the exigent against husband and wife, and the husband puts in a *superfedeas* for himself only, on appearance, without making mention of his wife, the court directed that the *superfedeas* should be stayed, without recording the appearance of the husband, and the process should continue until outlawry.

### *Of Popish recusant Convicts.*

NUMEROUS and severe are the laws now in force against those professing the Roman Catholic faith: but however well founded the complaints at present may be, that those who now adhere to that profession, do not merit to be excluded from a participation of the common rights of British subjects; yet it should be considered, that the spirit of the times in which those laws were enacted, could be appeased with nothing less. The struggle then was whether Popery or Protestantism should prescribe the law. No wonder then that when the doctrines of the church of England came to be by law established, its adherents still smarting

<sup>d</sup> 2 Roll's Rep. 90.

<sup>e</sup> Cro. Car. 58.

<sup>f</sup> Case of Bilford & Fox.

<sup>1</sup> Leon. 438.

from Popish rigor, should use every possible means to wrest the scourge from hands that employed it so cruelly; and even in those intolerent times, the adherents to the church of Rome were not anathematized by fire and faggot, but the legislature contented itself with debilitating its enemies by the less violent and more gradual operation of pains and penalties. And although these penal statutes still remain unrepealed, notwithstanding the political necessity which created them, is now happily removed, yet they are never made the instruments of persecution and oppression. And it should be remembered that the severe penalties inflicted by most of the acts of parliament against those who profess the Popish faith, do not take effect against any, but such as are legally convicted of professing that faith, and absenting themselves from the service of the church of England.

All such as refuse to join in public worship as established and performed in the church of England are stiled recusants; a Popish recusant convict is a Papist legally convicted of so doing<sup>g</sup>. The husband of a feme covert, who is a recusant convicted, was expressly exempt from any forfeiture, by stat. 3. Ja. I. c. 4. sect. 40. but by another act very soon after passed<sup>h</sup>, such feme covert was rendered punishable with imprisonment, unless the husband paid for the offence of his wife 10l. for every month, or else the third part of all his lands and tenements during the time that she remains a recusant convicted, and shall continue out of prison.

<sup>g</sup> The acts of parliament respecting Roman Catholics are as follow, viz.  
 1 Eliz. c. 1. 13 Eliz. c. 2. 23d. c. 1. 27th. c. 2. 29th. c. 6. 33d. c. 2. 1 Ja. I.  
 c. 4. 3d. c. 4. 5. 7th. c. 6. 3 Car. I. c. 2. 25 Car. II. c. 2. 30th. stat. 2. c. 1.  
 1 W. & M. c. 9. 15. 17. 18. 28. 11 & 12 W. III. c. 5. 12 Anne, stat. 2.  
 1 Geo. I. stat. 2. c. 55. 3d. c. 18. 9th. c. 18. & 24. 10th. c. 4. 11 Geo. II.  
 c. 17. 16th. c. 30.  
<sup>h</sup> 7 Ja. I. c. 6.

## C H A P. V.

*Of a Wife.*

**B**Y marriage the very being or legal existence of a woman is suspended ; or at least it is incorporated and consolidated into that of the husband ; under whose wing, protection and *cover*, she performs every thing ; and she is therefore called in our law a *feme-covert*, *fæmina viro co-operta* ; is said to be *covert-baron*, or under the protection or influence of her husband, her *baron*, or lord. And her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but such as are merely personal. For this reason a man cannot grant any thing to his wife, or enter into covenant with her : for the grant would be to suppose her separate existence ; and to covenant with her would be only to covenant with himself ; and therefore it is also generally true, that all compacts made between husband and wife when single, are voided by the intermarriage. A woman indeed may be attorney for her husband, for that implies no separation from, but is rather a representation of her baron. And a husband may also bequeath any thing to his wife by will, for that cannot take effect till the coverture determine by his death<sup>i</sup>. If a wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, in any temporal court ; and the action must be in his name as well as her

<sup>i</sup> F. N. B. 27. Co. Lit. 112. Cro. Car. 551.

own : neither can she be sued without making the husband a defendant. There is indeed one case wherein a wife shall sue and be sued as a feme-sole, viz. where the husband has abjured the realm, or is banished ; for then he is dead in law ; and the husband being thereby disabled from defending his wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions it is true the wife may be indicted and punished separately ; for the union is only a civil union <sup>k</sup>.

### *Maintenance of a Wife.*

**I**F a woman cohabit with her husband, he is obliged to find her necessaries, as meat, drink, clothing, physic, &c. suitable to his rank and fortune. So if he runs away from her, or turns her away, or forces her by cruelty or ill-usage to go away from him. But if he allows her a separate maintenance, or prohibits particular persons from trusting her, he shall not be liable during the time that he pays such separate maintenance ; nor for necessaries taken up of those persons particularly prohibited. But a general warning in the Gazette, or other news-paper, from the husband not to trust the wife, is not a sufficient prohibition ; and in all actions of this kind, the jury are to determine as to the wife's necessity, the husband's degree and circumstances, and the value of the things sold and delivered, and give a verdict, and assess damages accordingly.—A man brought an action against a husband for meat and other things provided for his wife. The defendant proved she went away from him with an adulterer. Raymond c. j. held, that the husband should not be charged for necessaries for her, though the plaintiff

<sup>k</sup> Salk. 119.    <sup>1</sup> Roll's Abr. 347.    Co. Lit. 133.    <sup>2</sup> Hawk. 3.

<sup>1</sup> 11 Hen. VI. c. 50.    <sup>1</sup> Roll's Ab. 350.    <sup>2</sup> Sid. 109. 110.    <sup>2</sup> Vent. 155.

who provided for her had no notice, and he said c. j. Holt always ruled it so <sup>m</sup>.—And in an action against the husband for a laced head sold to the wife, it was proved that the wife lived from the husband in adultery, and that she told the plaintiff she had a husband, but that signified nothing, for she would pay him herself. Raymond c. j. held the defendant not chargeable: and said he should have ruled it so if there had been no actual notice, which only strengthened the case <sup>n</sup>.—In assumpsit for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods, and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbade him ever to trust her again. After this the defendant and his wife cohabited together for a year, when, without any cause appearing, he left her, locked up her cloaths, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress she borrowed cloaths of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree, which he refusing to pay for, this action was brought, and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's there was a particular reason for the prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again. And if a husband should be allowed under the notion of a particular prohibition, to destroy her obtaining credit in one place, he

<sup>m</sup> Case of Morris and Martin, M. 12. G. I. Str. 647.  
Mainwaring and Sands, T. 12 G. I. Str. 706.

<sup>n</sup> Case of

may in the same manner prevent it with all the people she is acquainted with. He appears to be a wrong-doer, and therefore has no right to prohibit any body<sup>o</sup>.—In the case of Robinson and Greinold, Holt c. j. held, that though the wife be ever so lewd, yet while she cohabits with her husband he is bound to find her necessaries, and to pay for them; for he took her for better for worse: So if he runs away from her, or turns her away. But if she goes away from him, when such separation becomes notorious, whoever gives her credit, doth it at his peril: for the husband is not liable, unless he takes her again; for then it is as if a woman had eloped at common law, she thereby lost her dower; but if she came again, and her husband received her, the right of dower revived<sup>p</sup>.—If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her; but if she runs away from her husband, he shall not be bound to perform any contract she makes. On the other side, while they cohabit, the husband shall answer all contracts of hers for necessaries, for his assent shall be presumed to all necessary contracts, upon the account of cohabiting, unless the contrary appear<sup>q</sup>.—Action for linen sold to the defendant's wife. The defendant proved that his wife had lived in a very lewd manner; one Mr. Nott frequently coming to her at her husband's house, and they were locked up together in a bedchamber, and other indecencies passed between them. And it was also proved that she several times went to the house of this Nott, a gentleman in Wiltshire, who lived within three miles of the defendant's house. It did not appear that the husband disliked her going and staying at Mr. Nott's, but under these circumstances the husband and wife continued to live

<sup>o</sup> Case of Bolton & Prentice, M. 18 G. II. Str. 1214.

<sup>p</sup> 1 Salk. 119.

<sup>q</sup> Case of Etherington & Parrot, E. 2 An. 1 Salk, 118.

together.

together. Afterwards she went away from him, and went to Marlborough, where she resided for some time; but after the leaving her husband's house it did not appear that she ever saw Mr. Nott, or lived in a lewd manner. After some time she sent an attorney to her husband, to desire that he would receive her again; the husband told him, that if she came again she should never sit at the upper end of his table, nor have the government of the children, but should live in a garret. Then the attorney proposed to him to make her an allowance, and proposed about 80*l.* or 100*l.* a year, he being worth about 600*l.* a year; but that was not complied with; and afterwards she came to London, and bought the linen to the amount of 53*l.* By Raymond c. j. if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case, the husband does not absolutely refuse to receive her again; but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuited.<sup>r</sup> —Feb. 1768, on shewing cause against a motion for a new trial, in an action brought against the honourable Augustus John Hervey<sup>s</sup>, second son of the late earl of Bristol, and brother to the then earl, for lodging and necessaries for his wife<sup>t</sup>, during her residence at Bristol, (which her health absolutely required) wherein a verdict had been given for the plaintiff against Mr. Hervey: it appeared by lord Mansfield's report, who tried the cause, and repeated the evidence, that she had herself paid part of the money; namely, what

<sup>r</sup> Case of Child & Hardyman, T. 4. G. II. Str. 875.  
<sup>t</sup> The present earl of Bristol, 1777.

<sup>s</sup> The present  
<sup>t</sup> The present duchess of Kingston,

was due to the plaintiff for the former part of the time ; and that she had a pension during pleasure from the crown, determinable at the will of the crown, of 300l. a year, granted to her in her own name (*i. e.* her maiden name of Chudleigh) ; but not by any agreement, or otherwise, appropriated at all to her own use. That at her return from Bristol her husbands shut his doors against her ; that Mr. Hervey had never made, nor agreed to make, any separate allowance to her, or had contributed any thing towards her support, since he had so shut his doors against her ; nor had she any use of his table, servants, or equipage. And there was evidence given of his being reputed to have an income of about 1800l. per annum. The court was extremely clear that the husband was liable to this action, and that the verdict obtained against him ought not to be set aside. Here is no agreement for a separation, but he has sent her adrift by shutting his doors against her ; he allows her no separate maintenance, nor any support at all ; and there is no pretence of this lodging, and other support, provided for her by the plaintiff, being improper for her dignity and condition of life. And as she had no maintenance from her husband, nor admittance into his house, she was obliged to procure lodging and maintenance somewhere else. Every man is obliged to maintain his wife. The pension is only a voluntary grace and bounty of the crown, and only during the pleasure of the crown ; not what any creditor of her's, even for her necessary subsistence, suitable to her dignity and rank of life, can be supposed to give her credit upon <sup>u</sup>.

*A Wife acting by her Husband's Coercion; and Cases in which a Wife becomes liable to, or is exempt from, criminal Prosecutions.*

**A** FEME covert shall not be punished for committing any felony in company with her husband ; the law supposing she did it by the coercion of her husband. But the

<sup>u</sup> Thompson against hon. A. Hervey, H. & Geo. III. 4 Bur. Mans. 2177.  
bare



bare command of her husband shall be no excuse for her committing a theft if he was not present ; much less is she excused if she commit a theft of her own voluntary act. And for such atrocious crimes as treason, murder, or robbery, she is liable to suffer, although the fact was committed in company with her husband, or by his coercion <sup>v</sup>. And such coercion is always presumed until the contrary appears in evidence <sup>w</sup>. So likewise a wife may receive and harbour her husband, when guilty of a felony, without incurring the guilt of an accessory.—Generally a married woman shall answer as much as if she was sole or single, for any offence not capital committed against the common law or statute. And if it be of such a nature, that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without him, by way of indictment ; which being a proceeding grounded merely upon the breach of the law, the husband shall not be included in it, for an offence to which he is no ways privy. But if the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same ; as he may generally to any suit for a cause of action given by his wife ; and shall be liable to answer what shall be recovered thereupon <sup>x</sup>. A wife cannot herself take away her husband's goods feloniously, and if she takes them away, and delivers them to a stranger, it is no felony in the stranger <sup>y</sup>. If a woman receives stolen goods into her house, knowing them so to be ; or should lock them up in her chest or chamber, her husband not knowing thereof ; if her husband so soon as he knows thereof immediately forsakes his house, and her company, and makes his abode elsewhere, he shall not be charged for her offence ; or otherwise the law will impute

<sup>v</sup> 1 Hawk 2. 1 H. H. 47.

<sup>w</sup> 1 H. H. 516.

<sup>x</sup> 1 Hawk 3.

<sup>y</sup> H. P. c. 65. 1 Hawk. 93.

the fault to him and not to her <sup>2</sup>. A prosecution for a conspiracy is not maintainable against a husband and wife only, because they are esteemed as but one person in law, and are presumed to have but one will. In ancient times the law was so extremely rigorous against jurymen bringing a false verdict, that if twenty-four men, who were called the great jury, found them guilty thereof by the common law, the judgment was, that they should lose their *liberum legem*, and become for ever infamous: that they should forfeit all their goods and chattels; that their lands and tenements should be seized into the king's hands; that their wives and children should be thrown out of doors; that their houses should be raised and thrown down; that their trees should be rooted up; that their meadows should be ploughed; that their bodies should be cast into goal; that the party should be restored to all that he lost, by reason of the unjust verdict. But the rigour of this law deterring many from acting as jurors, therefore in aftertimes more moderate punishment was inflicted upon attainted jurors, viz. perpetual infamy; and if the cause of action was above 40*l.* value, a forfeiture of 20*l.* a-piece by the jurors, and if under 40*l.* then 5*l.* a-piece, to be divided between the king and the party injured. But the practice of setting aside verdicts upon motion, and new trials, hath so superseded the use of both sorts of attain, that no one instance of an attain appears later than the year 1593 <sup>3</sup>. Among the Romans, the wife of an insolvent creditor, together with her children, were liable to be sold to perpetual foreign slavery.

A master may lawfully correct his apprentice or servant with moderation, for negligence or other misbehaviour, but if the master's wife beats him, it is a good cause of depar-

<sup>2</sup> Dalt. c. 157.      <sup>3</sup> Finch, L. 486. 11 H. VII. c. 24. 23 H. VIII. c. 3. M. 35 & 36 Eliz. Cro. Eliz. 309.

ture. But if any servant or labourer assaults his master or dame, he shall suffer one year's imprisonment, and other corporal punishment, not extending to life or limbs<sup>b</sup>.

*Widows prohibited from marrying infra annum luctus,*

THE civil law forbids a woman to marry again within the year of mourning, (as it is styled) unless a special dispensation from the prince is obtained. And this restraint was founded on the uncertainty on which husband to fix the issue that might be born after the second marriage taking effect. And further, because a pious regard for the memory of the deceased husband should be shewn. And lord Coke says, this law prevailed before the conquest; and a widow marrying before the expiration of such year of mourning lost her dower: but the common law of England lays no such restraint on widows<sup>c</sup>.

*Cases determined upon Women being confined in private Mad-houses on the Plea of Insanity; and the Regulations now made respecting such Houses.*

THE wife of the honourable Peter Mackenzie, having sworn articles of the peace against him and others; and it having appeared fully to the court, as well upon some collateral motions as upon his own affidavit now produced, that he had never used any force against her, any otherwise than what was necessary to the care and cure of her as a person disordered in her mind; and this too in pursuance of Dr. Battie's advice; and that he had never in any other respect treated her with any sort of ill usage, but quite the con-

<sup>b</sup> F. N. B. 168. 5 Eliz. c. 4,  
124. 2 Domat. 126.

<sup>c</sup> 1 Inst. 8. Wood's Civil Law, 123.

trary ; the court ordered his recognizance to be discharged, and all proceedings against him to be stayed <sup>d</sup>.

Jan. 24, 1761, a motion was made for an Habeas Corpus to the keeper of a private madhouse, commanding him to bring up the body of Mrs. Deborah D'Vebre, who was confined there by her husband. But the court thought fit to order a previous inspection of her by proper persons, physicians and relations, and then to proceed as the truth should come out upon such inspection. A rule was accordingly made, that Dr. Monro, Peter Bodkin, her nearest relation, and Edmund Kelly, her attorney, should at all proper times, and seasonable hours, respectively be admitted, and have free access to Mrs. Deborah D'Vebre, the wife of Gabriel D'Vebre, at the madhouse kept by Robert Turlington, at Chelsea, in order to consult with, advise and assist her.— On the 26th an affidavit of Dr. Monro was read, which set forth, that he had seen and conversed with the woman, and examined her nurse, and saw no sort of reason to suspect that she was or had been disordered in her mind : on the contrary, he found her to be very sensible, and very cool and dispassionate. The doctor personally attended in court. Lord Mansfield thereupon ordered a writ of Habeas Corpus, by virtue of which Mrs. D'Vebre was brought up to court by Mr. Turlington. She appeared to be absolutely free from the least insanity. She was prepared to swear articles of the peace against her husband, and they were offered in court ready engrossed, but not being stamped, they could not be read.—She was permitted to go with her attorney to his house, he undertaking to produce her the next morning. She desired not to go back to the madhouse, and the court would not permit the husband to take her under the circum-

<sup>d</sup> King against hon. Peter Mackenzie, T. 6 G. III. 3 Bur. Mansf. 1932.

stances of danger then apprehended from him.—The reporter says, the matter was afterwards compromised, and a separation by agreement took place <sup>e</sup>.

An Habeas Corpus having issued, directed to Mr. Clarke, keeper of a private madhouse at Clapton, commanding him to bring up the body of Mrs. Anne Hunt, who was kept confined in his house. Mr. solicitor general moved to return the writ, at the same time offering an affidavit from Dr. Monro, importing, that at the request of her daughter, he had attended Mrs. Hunt, and found her a person disordered in her senses; he recommended her thereupon to the house of Mr. Clarke, who keeps a private madhouse, and is accustomed to have the care of such unfortunate persons: That in his judgment she still continues to be a lunatic, and not fit to be brought into court; and that he is informed, and verily believes, that a commission of lunacy will shortly be issued against her; and that it hath been deferred on no other account, but the minority of Anne Bowen, her grand daughter, and one of her nearest of kin, who is now come of age. But lord Mansfield proposed to put this matter into another method, viz. to use this affidavit by Dr. Monro, as a reason for enlarging the time to return the writ, instead of actually filing the return at present. Accordingly the court enlarged the time for making the return till the next term, being perfectly well satisfied by the affidavit of Dr. Monro, that Mrs. Hunt was not in a condition fit to be taken out of the custody of those to whom her person was entrusted, and who were on the point of obtaining a proper legal authority for what they were doing, which although intended for her benefit and advantage, had not yet obtained that strict legal sanction which they were now in a regular pursuit of <sup>f</sup>. But

<sup>e</sup> King against Turlington, H. 1 Geo. III. 2 Bur. Manf. 1115.

<sup>f</sup> King against Wm Clarke, M. 3 Geo. III, 3 Burr. Manf. 4362,

by 14 Geo. III. c. 49. it is enacted, that no person whatever in that part of Great Britain called England, &c. shall conceal or confine in any house kept for the reception of lunatics, more than one such lunatic at any one time, without having licence for that purpose, on forfeiture of 50*l*. And the president and fellows of the College of Physicians, at a general meeting, are directed to elect five fellows of the college yearly, to be commissioners for granting licences within the cities of London and Westminster, and seven miles of either, and in the county of Middlesex; such commissioners to meet annually on the third Wednesday in October, or within ten days after, to grant licences to persons for keeping houses for the reception of lunatics for one year. For licencing every house wherein not more than ten lunatics shall be admitted, 10*l*. shall be paid, and 15*l*. for every house receiving a greater number; which licence authorizes the keeping of one house and no more. No commissioner to be directly or indirectly concerned in keeping any such house whilst in office, on forfeiture of 50*l*. The keeper of every licensed house shall give notice of the name of every person received therein as a lunatic; and the name and place of abode of the person by whose direction such lunatic is sent; and of the physician, surgeon, or apothecary by whose advice such direction is given, which notices shall be sent to the secretary of the commissioners at the college. Every keeper of a licensed house, admitting into his house any person as a lunatic, without having an order in writing under the hand and seal of some physician, surgeon, or apothecary, certifying that such person is proper to be received as a lunatic; or who shall receive any lunatic with such an order, and shall not give notice thereof to the secretary of the commissioners, within the space of three days after admission, shall forfeit 100*l*. Three or more commissioners are required to inspect such licensed houses once in every year; and they are besides empowered

empowered to visit them as often as they shall think proper ; and whenever required by the lord chancellor, or the chief justice of the court of King's Bench, or Common Pleas. And they have liberty to examine the persons there confined as lunatics ; and a keeper of a licensed house refusing admittance to three or more commissioners, shall forfeit his licence. Minutes of such visitations are directed to be made and entered in a register to be kept in the college ; and whenever the commissioners shall discover any thing that deserves censure or animadversion, they shall make report thereof, and such report shall be hung up in the censor's room of the college for general perusal. Each commissioner to be paid one guinea besides reasonable charges for each visitation. Any person applying to a commissioner to be informed concerning any one supposed to be confined in a licensed madhouse, and making it appear reasonable to permit such enquiry to be made, the commissioner shall sign an order directed to the secretary for that purpose, who shall examine the register, and if he finds the person so enquired after entered therein, he shall give to the person so applying, the name of the keeper of the house, and of the persons by whose direction such lunatic is confined. All houses kept for the reception of more than one lunatic, in any other part of England than as aforesaid, shall be licensed by the justices of peace in quarter sessions, the keepers paying for such licenses at the same rate as before directed, and liable to the same regulations ; two justices of the peace for the county, and one physician, are directed to visit and inspect such houses. But the act is silent as to any money that shall be paid to them for their visitations. The keeper of every licensed house, whether within the cognizance of the commissioners appointed by the college, or of the justice of the peace, is required to enter into recognizance of 100l. with two sureties of 50l. each, for his good behaviour. This act became in force November 1774, and is

is to continue five years.—A writ of Habeas Corpus, upon sufficient cause shewn upon oath, may still be had to bring up the body of any one confined as a lunatic into court, that justice may be done.

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## C H A P. VI.

### *Of the Ecclesiastical or Spiritual Courts.*

THE jurisdiction of the ecclesiastical courts extends to all cases of blasphemy, heresy, schism, incontinence, matrimony, divorce, right of tithe, probate of wills, and granting of administrations. The policy of the church of Rome led it to convert the contract of marriage into a holy sacrament, which that church managed with so much address, that it soon became an engine of great importance to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with by the Holy See, not only enriched the coffers of the church, but gave a vast ascendant over princes of all denominations, whose marriages were sanctified or reprobated; their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according to the humour or interest of the reigning pontiff: besides a thousand nice and difficult scruples with which the clergy of those ages puzzled the understandings, and loaded the consciences of the inferior orders of the laity, and which could only be unraveled by those their spiritual guides; yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder, that the same authority which enjoined the strictest celibacy to the priest-



priesthood, should think them the proper judges of causes between man and wife. But the introduction of a more pure and rational system of religion at the reformation, removed those impediments to marriage which priestcraft had invented ; and by allowing free liberty of marriage to the clergy, permitted that passion to flow in a regular and gentle course, which had before risen above the banks of decorum, and spread with an impetuous and licentious torrent ; for a great writer observes, that the matrimonial causes which were brought before the Romish clergy, partly from the nature of the injuries complained of, and partly from the clerical method of treating them, soon became too gross for the modesty of a lay-tribunal ; and he adds, that some of the impurest books that are extant in any language, are those written by the Popish clergy on the subjects of matrimony and divorce †.

The king is the supreme head of the ecclesiastical as well as the civil courts of justice ; but he has the supremacy over the former, not as sovereign of the state, but as supreme head of the church ; and lord Hale observes, that neither the canon nor civil law have any obligation as laws within this realm, because that the popes or emperors made those laws, canons, rescripts or determinations ; or because Justinian compiled their body of the civil law, and by his edicts confirmed and published the same as authentic ; or because this or that council or pope made those or these canons or degrees, or because Gratian or Gregory, or Boniface or Clement did (as much as in them lay) authenticate this or that body of canons or constitutions ; for the king of England does not recognize any authority superior or equal to his own in this kingdom, neither do any laws of the pope or emperor, as they are such, bind here : but all the strength that the papal or imperial laws have acquired in this king-

dom, is only because they have been received and admitted, either by the consent of parliament, and so are part of the statute laws of this kingdom ; or else by immemorial usage and custom in some particular cases and courts, and no otherwise ; and therefore so far as such laws are received and allowed of here, so far they obtain, and no farther ; and the authority and force they have here is not founded on, or derived from themselves, for so they bind no more with us, than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence, and enforces their obligation. And hence it is, that even in those courts where the use of those laws is permitted according to that reception which is allowed, if they exceed the bounds of that reception by extending themselves to other matters than hath been allowed to them ; or if those courts proceed according to that law when it is controlled by the common law of the kingdom, the common law may and doth prohibit and punish them <sup>b</sup>.

Every bishop by his election and confirmation, even before consecration, hath ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese ; and diverse abbots anciently, and most archdeacons at this day, by usage, have had the like jurisdiction, within certain limits and precincts <sup>c</sup>. In the case of the bishop of St. David's, it was alledged against the proceedings of the archbishop, that he was cited to Lambeth before the archbishop himself, and not to the court of Arches : upon which it was declared by the court of King's Bench, that the archbishop may hold his court where he pleases, and may convene before himself, and sit judge himself ; and so may any other bishop ; for the power of a chancellor or vicar general is only delegated in case of

<sup>b</sup> Hale's h. Com. L., 27, 28.

<sup>c</sup> ib. 30.

## RIGHTS AND PRIVILEGES OF WOMEN. 81

the bishop<sup>k</sup>. The spiritual courts are, (1.) The Archidiaconal court. (2.) The Consistory court. (3.) The court of Arches. (4.) The court of Delegates; which is composed of civilians and judges in the court of Equity. By stat. Henry VIII. the sentence of a court of Delegates is declared final, and no appeal will lie from them; but the king may, by his royal prerogative, upon a special case laid before him, direct a commission for reviewing the sentence; but that remains the same unless the reviewers in their judgments shall think proper to reverse it. And the difference between a commission for a review, and an appeal is, that in the first the sentence is not suspended, in the other it is.

Marriage, by the constitution of this country, is of ecclesiastical cognizance; the courts christian have a power exclusively to take cognizance of the right of marriage. The secular jurisdiction has cognizance of the temporal interests which are incidental to marriage; but the sentence of a court christian extends to all who were parties or privies, or in notion of law have committed laches, in not intervening or reclaiming. But when the spiritual courts proceed to call a marriage in question after the death of either of the parties, this the courts of common law will prohibit, because it tends to bastardise and disinherit the issue, who cannot so well defend the marriage as the parties themselves, if both had been living, might have done. Besides, the design for which ecclesiastical punishments are inflicted, being to amend the offenders, or *pro salute animarum*, this purpose is defeated by the death of either of the delinquents<sup>l</sup>. In each of the ecclesiastical courts the parties are not bound to what may have been given in evidence in an inferior court. It is not merely error in law, but error in fact likewise may be corrected upon appeal; and if there be any facts material to the point in issue that have not been pleaded and examined

<sup>k</sup> 2 Salk. 134.

<sup>l</sup> 2 Inst. 614.

in the inferior courts, they may be pleaded, and given in evidence in the court of appeal. And in every ecclesiastical court it is not a matter confined to the two parties that join issue in the suit, and therefore may carry it on collusively; for in any period of the cause, a third person, that has an interest in the matter in question, if he sees that the two original parties are colluding, or that one of them is negligent, or if he has any other reason to be dissatisfied with the manner in which the business is conducted, he may intervene for his interest; and the court must *ex debito justitiæ* admit him to do so. He may examine his own witnesses, and act in all respects as a party in the cause.—In writs of dower, or other writs brought in the king's temporal courts, if issue is joined upon *not accoupled in lawful matrimony*, this being a cause which is merely ecclesiastical, the trial thereof must be by the bishop or ordinary, upon an inquisition taken before him as judge; which is after this manner. The king first sends his writ to the bishop to make the enquiry: for the ecclesiastical judge before he hath received the king's writ, may not of himself inquire of the lawfulness of the matrimony; but after such time as he hath received the said writ to make the enquiry, he must not surcease for any appeal or inhibition, but must proceed until he hath certified the king's court thereof: and then when the bishop hath received the king's writ, he must give notice to the parties who took exception to the matrimony, at his dwelling-house, if he has any one within the diocese, to speak on a day fixed against the matrimony. And the cause then proceeds, the witnesses of the demandant to prove the legality of the marriage are taken, and admitted by the bishop, if no just exception is taken to them. After the depositions are taken, they are published, and certified into the king's court where the issue was joined, by letters under the seal of the bishop, importing, that in pursuance of the said writ he hath made  
due

due enquiry, according to the ecclesiastical laws, into the matters therein contained, and that he hath found by lawful proofs, and other canonical requisites in that behalf, that such person (as the case shall be) was or was not accoupled in lawful matrimony. For he must certify the point in issue generally, and not make a special verdict of it, or express the manner of the marriage at large. After such certificate made no appeal will lie, but all parties are for ever concluded. On receiving such certificate, the tenant is re-summoped into the king's temporal courts, and judgment is given<sup>m</sup>.

*Of a Suit of Jactitation of Marriage.*

**SUCH** a suit is grounded on a plea of defamation, when a man or woman publicly declares himself or herself to be married to another, by which a general belief of such marriage is spread; in this case the party injured may libel the person so boasting in the spiritual court, by a suit which is called *causa jactitationis matrimonii*<sup>n</sup>; the marriage must be denied upon oath by the libellant; and when a marriage is pleaded to justify the claim by the libellant, it is not then a direct matrimonial case, but such incidentally only. If the marriage be proved, there is the same sentence passed as in any matrimonial cause; pronouncing there was a marriage. The parties are pronounced to be man and wife, and they may be admonished to restore to each other conjugal rights. If on the contrary the defendant fails in proof, the sentence of the court is, that "The party has failed in his justification matter, in proof of the marriage alledged to have been between them, and the parties are declared to be free from all matrimonial contracts, as far as to us as yet appears."

<sup>m</sup> Hughs, 293.

<sup>n</sup> Co. Lit. 233.

On the trial of the duchess dowager of Kingston, before the house of lords, on an indictment for bigamy, the validity of a sentence pronounced by the court Christian, in a cause of jactitation to barr all suits criminal as well as civil, against the parties who are the objects of such sentence, was much agitated, and a point of law of very great moment settled. It was contended in that cause, that a sentence in the ecclesiastical courts is conclusive against all the world; and it was compared to a sentence of a court of admiralty, against which there lies no appeal, no not even to the supreme court of judicature the house of lords. A sentence in a jactitation cause, was contended to be equally conclusive with any other decree, and even if such sentence should be found to have been obtained by the fraud and collusion of the parties, that it is notwithstanding conclusive to all other courts, and the fraud can only be examined into in that court, whose justice has been thus insnared. And several cases were cited in support of this doctrine.—Hatfield against Hatfield, in the house of lords, in the year 1725, where, on an appeal from Ireland, a woman brought a bill against her supposed husband's son by a former wife; he insisted she never was married to his father, but to one Porter, whose marriage with her was proved, and a release from him. She upon this sued Porter in the spiritual court, in a jactitation cause, and obtained sentence against him; and then made that her case in chancery, where it was held to be conclusive evidence. And the opinion was affirmed in the house of lords here.—An action brought for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery. The plaintiff proved a marriage by the parson and by a woman, and also the consummation. To encounter which the defendant produced a sentence of the consistory court of

London, in a cause of jactitation of marriage brought by the woman against the plaintiff, wherein she was declared free from all contract, and silence imposed on the plaintiff, which sentence was pronounced since issue had been joined in the cause. Lord Hardwicke c. j. ruled it to be conclusive evidence till reversed by appeal <sup>p</sup>. And in another cause between Da Costa and Villa Real, in an action upon a contract of marriage, *per verba de futuro*, brought by the gentleman against the lady, who pleaded *non assumpsit*; when the plaintiff had opened his case, the defendant offered in evidence a sentence of the spiritual court, in a cause of contract, where the judge had pronounced against the suit for a solemnization in the face of the church, and declared Mrs. Villa Real free from all contract. And the chief justice held this to be proper and conclusive evidence on *non assumpsit*; that it was a cause within the jurisdiction of the spiritual court, though the contract was *per verba de futuro*, and though the suit there is *diverso intuitu*, being for a specific performance, as far as admonition will go; and this suit is for damages <sup>q</sup>. So in a divorce *a vinculo matrimonii*, for frigidity, and perpetual impotency of generation; the husband so divorced afterwards married another wife, and had children by her. Upon which it was urged, that the church having been evidently deceived as to the husband's perpetual impotency, the divorce consequent on such sentence was null; and if so, the second marriage was unlawful, and the issue illegitimate. But the court resolved, that since there had been a divorce for frigidity, it was clear that each of them might lawfully marry again; and though it should be allowed that the church appearing to have been deceived in the foundation of their sentence, the second marriage was voidable, yet till it should be dissolved, it remained a marriage, and the issue

<sup>p</sup> H. 7 C. 11. Stat. 960.

<sup>q</sup> Id.

during the coverture lawful'.—Prudham, as a creditor, brought an action of debt against Terefia Constantia Phillips. She gave in evidence her marriage with Muilman. Prudham produced a sentence in the court christian annulling that marriage, in a cause of nullity on account of a prior marriage with one Delafield. It was argued by her council, that the defendant Phillips might be admitted to shew fraud in obtaining the sentence, and so to avoid it in the manner that judgments in the common law courts are avoided, by replication of fraud. But the court would not suffer her to alledge fraud in herself to her own avail'. The testator, when in perfect health, had made his will, and thereby gave to the plaintiff Archer, his nephew, the greatest part of his personal estate, to the value of 500*l*. But one Bridget Sandyman, his maid-servant, had in his sickness prevailed upon him to make another will, and to marry her a week before his death, when he lay in his sick bed, at six o'clock at night, though it was really proved by two ministers, that she was a year before actually married to the defendant Mosse, and was then his wife, and that Mosse procured the licence for the marriage of the testator to Bridget; and this will being set up by Mosse, (executor to Bridget) though it appeared that there was as gross a practice as could be in the gaining the will, (the testator being *non compos mentis* both at the time of making the will, and also at the time of the supposed marriage, and that in his health he knew that Mosse and Bridget were married) and that Bridget suppressed the first will; yet that will so set up, being proved in the prerogative court, and the matter in question relating only to a personal estate, the lord chancellor was of opinion, that whilst the probate stood, the matter was not examinable in chancery; and though

<sup>1</sup> Bury's Case, M. 40 & 41 Eliz, Cod. 446.

<sup>2</sup> Str. 961.



the fraud was fully proved and opened to him, he would not hear any proofs read, but dismissed the bill.

In reply to which it was acknowledged, that the sentence of a competent court binds the parties and all persons, deriving any right from them; as to third persons it was insisted, that it neither prejudiced nor benefited them. A sentence of a court having competent jurisdiction; if it comes collaterally before another court, in another suit, it shall be presumed just till the contrary appears. One court has no authority to direct the judgment of another; but it is a fair presumption, that what hath been decided, hath been justly decided. It is, however, but a presumption, and in most cases it obtains only till the contrary is proved. Notwithstanding there are cases in which that presumption may amount to a conclusion; where the sentence hath been pronounced *in rem*, by a judicature having a peculiar and exclusive jurisdiction over the subject matter of the cause, the effect of such a decision is not to be controverted in any other civil suit: such is a sentence of a court of admiralty upon the forfeiture of a ship; the judgment of the court of Exchequer condemning goods as forfeited. Such courts pronounce upon the property itself. The ecclesiastical court has the sole jurisdiction of cases testamentary, by which personal effects pass; and of matters matrimonial to a certain effect. If therefore a question arises, who is intitled to the personal estate of a man deceased, with or without a testament; the probate of a will, or the grant of administration give the title to the property in question; the effect of it cannot be contested in other courts collaterally and incidentally, because no other court has power to controvert the act; no other authority can confer the title to the thing in

dispute. Such sentences are *in rem*. The case is very different where the decision is upon a personal contract; or any matter arising out of the various civil relations of persons, in which the original cognizance of the cause might have come before the court where that decision is offered as an evidence of right. There the judgment of the foreign court can only have effect so far as it is just; no authority belongs to it but from its internal justice; for the court in which it is produced owes no obedience to the court which pronounces it; and is equally competent to give the law to the parties. The effect of the sentence, however, is beneficial to the party who has obtained it; because the justice of it is presumed: the truth of the facts on which it proceeded, is admitted without proof; and the adverse party is obliged to evidence the falsehood and iniquity of it. If an estate, relationship, rank, are obtained by criminal means; if the situation which a person chooses to relinquish is attended with duties, the advantages of that situation, but not the duties, may be waved by the party. The peace and order of society must be maintained; and no violation of them can pass with impunity. From whence it must follow, that no determination between party and party can preclude public justice from enquiring into the criminal tendency of actions. Daily experience proves this in the most trivial instances. An action is brought for an assault; the party fails in it; there is a verdict against him; does that prevent a prosecution upon an indictment for the very same fact, against the very same party? In such an indictment was it ever pleaded, that an action had been brought against the party for that alledged trespass and beating, and that he had been acquitted upon that action? A question may arise in an action upon property, to which of two persons a thing, an horse, for instance, belongs. It is decided to belong to A. and not to B. will that decision barr an indictment against A.

A. for stealing the horse? It is no answer to public justice that he has acquired that property, when the object of the criminal enquiry is, whether he has committed a crime in acquiring it.

In a suit for jactitation of marriage, the supposed husband or wife complains to the ecclesiastical judge, that he or she is a person free from all matrimonial engagements or contracts with the adverse party, and so esteemed by all neighbours, friends, and acquaintance; that the adverse party, notwithstanding the knowledge of this, has falsely and maliciously boasted of a marriage with the party complaining; it concludes, that by such false assertions, an injury is committed, and prays that right may be done, by declaring the party free from all matrimonial engagements with the other; and by enjoining that party perpetual silence. The party defendant may either say, I have not boasted, I deny that fact; or if he admitted that he has boasted, he is then to go on and alledge circumstantially a marriage, which the other party denies. Under the circumstances alledged, if the marriage is not proved, then the court pronounces, that *so far as yet appears*, the party complaining is free from any matrimonial contract with the other party, and enjoins perpetual silence. But this injunction of *perpetual* silence continues no longer than is agreeable to the party; who can at any time renew the suit, and produce evidence of the marriage, which was before either purposely kept back to answer some indirect view, or could not then be procured. New witnesses may continually be admitted in favour of matrimony, after the former depositions have been inspected; and, without any proof made, that such witnesses are lately come to the knowledge of the producer, which is a proof expected and required in all other causes whatever, and a rule never departed from. The very form of the sentence argues against its being conclusive, for the sentence of the ecclesiastical court given in favour of a libellor, pronounceth no marriage to be proved *so far as yet appears*. It therefore

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wants the essential property of a judgment in all other kinds of suits in all courts of law, the putting an end to litigation; in short, this kind of suit is from beginning to end totally singular. And of this opinion were all the judges, who declared, that no sentence of the ecclesiastical courts can be pleaded in barr to an indictment for a criminal offence, the parties therein not being the same. For the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend it, or examine witnesses, or in any manner to intervene or appeal; and by the establishment of such a doctrine, the spiritual courts would acquire a judicial cognizance in matters of crime, an immediate influence in trials for offences, and draw the decision from the course of the common law, to which it solely and peculiarly belongs, which would entirely pervert the purposes for which they received their judicial powers, which are merely spiritual considerations, *pro correctione morum, et pro salute animæ*, they were therefore addressed to the consciences of the party; whereas one great object of temporal jurisdiction is the public peace, and crimes against the public peace are wholly, and in all their parts of temporal cognizance alone. They observed further, that if the reason for receiving such sentence is, because it is a judgment of a court competent to the enquiry then before them, from the same reason the determination of two justices of the peace, upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give law to the highest court of criminal jurisdiction.

But if a direct sentence upon the identical question in a matrimonial cause should be admitted as evidence, (though such evidence against the marriage has not the force of a final decision

decision that there was none) yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect.

So that admitting the sentence in its full extent and import, it only proves, that it did not yet appear they were married, and not, that they were not married at all: and by the rule laid down by lord chief justice Holt, such sentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence, and this judgment, may stand well together, and both propositions be equally true: It may be true, that the spiritual court had not then sufficient proof of the marriage specified, and that now sufficient proof of some marriage may be found.

### *Of the Restitution of Conjugal Rights.*

**I**F a husband or a wife withdraw or live apart one from the other, without some cause that the law shall deem sufficient, the party who is desirous of a re-union may enter a suit for restitution of conjugal rights, and the ecclesiastical court will compel them to come together again.—Matthews and Matthews in the consistory court of London. The husband brought a suit against his wife for a restitution of conjugal rights; in barr of which restitution the wife pleaded adultery in the husband, and on bringing proof of which she obtained a sentence of divorce.

*Of Divorces.—Of a Divorce a mensa et Thoro.*

**I**F it becomes improper, from some supervenient causes arising after marriage, that the husband and wife should not live together any longer, as through intolerable ill-temper and cruel usage; the result of it; adultery on either side; a perpetual disease; impotence; and the like; whatever the court considers as an unfitness or disability for the marriage state, may be looked upon as an injury to the suffering party; and for these the court administers the remedy of separation, or a partial divorce, which supposes the marriage lawful in itself. The civil or Roman law was so severe in punishing delinquency in married women, that it allowed a husband the power of suing out a divorce, if his wife frequented the theatre or public games without his knowledge and consent. Adultery is the principal cause of divorce with us; but the spiritual court cannot pronounce a total divorce *a vinculo matrimonii* for this crime, in either party, although the legislative power indulges husbands thus aggrieved with annulling of their marriage contract; by which each party obtains free liberty to marry again; but with restriction on the part of the woman, that she shall not contract marriage with the man with whom she has held that illicit commerce, upon proof of which the divorce is obtained. But whether public decorum, and a semblance of decency is better preserved by this restriction, than if it was not enjoined, is perhaps problematical. Certain it is, the only atonement the transgressing parties can make, is by legally marrying with each other; by preventing which, a restoration of the woman to the notice of the virtuous part of her own sex, seems to be prevented. She must either live with her gallant meretriciously, or govern herself the rest of her life by the icy precepts of chastity. And I should  
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hope that in some instances it may be allowed, that *modern* breaches of chastity in women may be excited, by notorious, avowed, and long persisted in, acts of indifference and neglect in the husband ; and that the wife's resentment may be further excited, by being fatally convinced of her husband's unbridled and promiscuous amours ; there may be a time to a woman so mortified and provoked, when her virtue nods, and when the assiduity of a lover, attentive to every means of rendering himself agreeable, may be too strong for that conscious dignity and innate virtue, which ought to keep unremitting watch over every avenue to her heart. . Perhaps the cloyed husband seizes the earliest opportunity, and his wife's incontinence instantly becomes notorious ; a divorce takes place, she is left at liberty to marry with any man but her gallant. Perhaps her attachment to him was founded on something like sentiment, though a proper guard was not kept over her heart, to prevent its growing imperceptibly into a criminal love ; if so, a marriage with him seems the only direct means of reclaiming a sinner : why then should this only probable chance for reformation be denied her ? Does such a restraint tend to correct the libertinism of married women, or to lessen the number of divorces ? If it can be supposed that the women become incontinent in order to be disgracefully released from their marriage ties, the strongest presumption lies that the husband was promoting or instigating this scheme ; which, if suspected, would effectually prevent his receiving the relief he so unwarrantably prays for. For if a divorce is thus collusively sought, the legislature is made the dupe of two abandoned individuals, the pander for their mutual lust, and subservient to the basest purposes. It is further to be observed, that a woman cannot obtain the same redress from the legislature against her husband, if she prove him incontinent. And even in a case of bigamy, a first wife cannot procure an act of parliament to dissolve her marriage. For by such conduct in a husband nothing is

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committed that tends to bastardize the issue born in wedlock, that consequence arising entirely from the infidelity of the woman. Nor does the legislature concern itself in redressing such grievances for the sake of relieving a particular individual, but on the general principle of the great consequence which it is of to the community, that all property should be transmitted to the heir lawfully begotten, with as little doubt and uncertainty as possible; for if it be a man's misfortune to marry a woman who afterwards proves to be profligate and lewd, if such an one could not obtain relief upon a discovery of his wife's guilt, his estate might descend to a spurious race, of which no eyes but those of the law would look upon him to be the actual father.

By the divorce *a mensa & thoro*, the bond of marriage is not dissolved. So that a wife entitled to a legacy left to her whilst so divorced, may be barred of her claim by her husband giving a release<sup>u</sup>. Nor is she hereby barred of her dower; neither are the children bastardized. She is entitled to alimony in proportion to the circumstances and condition of her husband. If she sues without her husband for defamation in the spiritual court, no prohibition will lie against such suit, although the marriage is not dissolved. But if she shall have any children after the divorce, they will be accounted bastards; for an observance of the sentence is always supposed<sup>v</sup>. And the parties so separated are by caution and restraint inserted in the sentence, enjoined to live chastly and continently; neither are they allowed to contract matrimony with any other person during the other's life<sup>w</sup>. And any marriage contracted during a divorce *a mensa & thoro*, is null and void.—As in the case of Foliambe H. 44 Eliz. who having been divorced from his wife for incontinency on her part, married again during her life, and the second marriage was declared to be void<sup>x</sup>.

<sup>u</sup> Cod. 33.<sup>v</sup> 1 Salk. 123.<sup>w</sup> Canon. 107.<sup>x</sup> Mod. 683. Codex. 446.



Anciently the crime of adultery dissolved the band of marriage totally, and in the early part of queen Elizabeth's reign, the church held, that after a divorce for adultery the parties were at free liberty to marry whom they would; but afterwards it was seen necessary to change that opinion; and archbishop Bancroft, by the advice of divines, held, that adultery was a cause for a partial divorce only<sup>y</sup>. In 1597 the canons restrained the ecclesiastical courts from pronouncing sentence of divorce upon the sole confession of the parties, which practice before the laying on of such restriction had been most licentiously abused. And there are at this day many instances preserved of such fraudulent contrivance of the husband and wife, to procure a dissolution of the marriage contract.—Collet married Mary, and had children by her; against whom it was libelled that he had before married Anne, the sister of Mary: He and Anne appeared, and confessed the matter, upon which a sentence of divorce was about to pass; and a prohibition was prayed for in behalf of the children, who were in danger of being bastardized by such fraud; for Collet in truth was never married to Anne, but it was a contrivance between him and his wife to get themselves divorced, after they had lived together sixteen years<sup>z</sup>. And supposititious women, not the wives of the party, were suborned to come and confess adultery in the names of the real and true wives, and thus the real wife might be divorced, and remain entirely ignorant of the matter<sup>a</sup>.

If the party accused shall prove that the accuser hath also committed adultery, this is a compensation for the crime, and the accuser shall not prevail in his suit<sup>b</sup>. And the presumption of guilt may go sometimes for a proof of the

<sup>y</sup> 3 Salk. 138.

<sup>z</sup> 2 Mod. 314. Codex, 445.

<sup>a</sup> 1 Ought. 316.

Clarke.

<sup>b</sup> Ought. 317.

crime ; as when a man and woman are seen in bed together, this is allowed to be sufficient evidence, for such crimes will scarce admit of other proof<sup>c</sup>. In like manner, if the party accused shall prove that the accuser before the commencement of the suit had probable knowledge of the crime committed, and yet afterwards had matrimonial intercourse with the accused, in such case the accuser shall not obtain a sentence of divorce : for the crime is supposed to have been remitted. Therefore if the husband is desirous of being divorced from an adulterous wife, he must abstain from her bed, although he continues to live under the same roof with her<sup>d</sup>.—A husband prayed a prohibition to the ecclesiastical court of Salisbury, because his wife sued him there to be separated from him, *propter fœvitiam*. And sentence was there given for the husband against the wife, and he was enforced to pay all the costs for his wife. And afterwards she appealed ; and because the husband would not answer the appeal against himself, and pay for the transmitting of the record ; he was thereupon excommunicated. He therefore prayed a prohibition. The court allowed the case to be very hard, that a husband should be forced to spend money against himself ; but because it was alledged, that the rule of practice was such in the spiritual court, they would advise until the next term, and ordered to stay their proceedings in the mean time<sup>e</sup>. If the husband takes apparel, or other necessaries from his wife, this is a good ground to sue for a divorce *causa fœvitiae* ; or if one of them be in dread of the other for poisoning, this likewise is a good ground<sup>f</sup>.—If a woman is divorced *a mensa & thoro*, she must sue by her next friend<sup>g</sup>. An husband prayed a prohibition to the consistory court of London, for that he was sued there by his wife to be separated from her *propter fœvitiam* ; and sentence was

<sup>c</sup> Clerke, 115. Wood's Civ. Law, 274.  
Case, M. 1 Carr. Cro. Car.

<sup>d</sup> 1 Ought, 317.

<sup>e</sup> Green's

<sup>f</sup> Baron & Feme, 433.

<sup>g</sup> Ib. 434.

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there given against him, that his wife should live from him, and that he should allow her 5s. 6d. weekly, although the husband offered reconciliation, and desired to cohabit, and promised to use her kindly. But the court denied a prohibition, because the court of the ordinary is the proper court for allowance of alimony, and may take order for separation or divorce, if the wife is cruelly used<sup>b</sup>.

*Of Divorce a Vinculo matrimonii.*

**L**EGAL marriages can only be dissolved either by death or divorce. It has been already observed, that of divorces there are two kinds, the partial and total, the latter of which is now to be spoken of. The total divorce which absolves the parties *a vinculo matrimonii*, must be grounded on some of the canonical causes of impediment to marriage enumerated in the third chapter, and such causes must have existed before the marriage, as is always the case of consanguinity; not arising afterwards as may be the case in affinity or corporal imbecility. In case of total divorce the marriage is declared null, as having been unlawful *ab initio*; and the parties are declared separated, *pro salute animarum*. And such sentence is only declaratory of this nullity, and does not create it. So that in debt upon an obligation, though the defendant pleaded that at the time of the bond she was the wife to a person there named; yet the plaintiff shewing that a former wife was alive at the time of such person marrying the defendant, and that thereupon such marriage with him had been adjudged null and void in the spiritual court, judgment was given against her, because the marriage being merely void, she was always sole: and it was further said, that in such case the divorce was only declaratory, and there needed not any such sentence<sup>1</sup>.—The effects of which

<sup>b</sup> Cro. Ja. 364.

<sup>1</sup> Cro. Eliz. 857. Cod. 446.

original voidance are, that the wife is barred of dower, and the issue are illegitimate, and the persons so divorced may marry any other without restraint<sup>k</sup>. A sentence of divorce may be repealed even after the death of the parties; but if either of the parties is dead before sentence is pronounced, the marriage cannot be declared void, and the issue bastardized: the marriage being already dissolved by death, and the question whether legitimate or not in order to inherit, belongs originally and exclusively to the king's courts<sup>l</sup>.

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## CHAP. VII.

### *Of the Settlement of Paupers.*

#### *What makes a Settlement.*

**H**AVING land in a parish will not make a settlement, but living in a parish where one has land, will gain a settlement without notice; and the residence is not required to be upon the same estate, if it be within the same parish; nor is it necessary in such a case, that the residence be for forty days successively, provided it be for more than forty days upon the whole<sup>m</sup>.

If a man obtains a certificate for himself and a woman who lives with him as his reputed wife, which certificate describes them as husband and wife; if he settles in another parish, where he has children by her; if such children become actually chargeable to the parish where they are so settled on the death of the man, and it appear in evidence

<sup>k</sup> Cod. 446. Co. Lit. 235.  
Barrow's Set. Ca. 125.

<sup>l</sup> Viner art Bast. G. 4.

<sup>m</sup> 2 Salk. 524.

before the justices, that such man and woman were never married, the justices cannot nevertheless adjudge the children to be bastards, and therefore entitled to a settlement in the parish where they were born; but the validity of the marriage must not be disputed, and the certificate is conclusive to settle the children as if born in wedlock <sup>a</sup>.

So if a man receive a certificate from a parish, acknowledging Mary his wife, and their four children to be legally settled in their parish, and afterwards it appear, that he was married to another woman then living, and that the said Mary was not his lawful wife, still the parish that certifies is liable to take care of the two wives and their respective children <sup>b</sup>.

### *Settlement by Marriage.*

**A** Woman marrying a man that has a known settlement, shall follow the husband's settlement, even though she had never been there <sup>c</sup>.

A wife can gain no settlement separate and distinct from her husband during her coverture; and a woman marrying a man that has no known settlement, shall not lose her former settlement which she had before marriage. But where the husband is supposed to be living, a difficulty has arisen, whether she is entitled to the same settlement, being under coverture, as if she was a widow.—On this point opinions have been different.—It has been held, that the marriage ought not and cannot put her in a worse condition than she was in before; and they hold that she continues her settlement,

<sup>a</sup> Case of New Windsor and White Waltham, T. 5 G. I. St. 186.

<sup>b</sup> Case of Headcorne and Maidstone, T. 19 G. II. before lord Mansfield. Burrow's Set. Ca. 253. p. 1 Set. Ca. C. 10. 105. 2 Idem. 112.

notwithstanding her marriage<sup>9</sup>. On the contrary, in the case of *Stretford and Norton*<sup>1</sup>. An Englishwoman married an Irishman who had no settlement in England; he ran away, two justices removed the wife to the place of her settlement before marriage; and it was urged, that there could be no pretence that this separated her from her husband; and if she cannot be sent thither, she can be sent no where. But, by Lee, c. j.—it is now a settled point, that by the marriage the woman's settlement is suspended, whether the husband has or has not a settlement; for otherwise the justices might separate husband and wife; and therefore, to make the order clear, it should have appeared, that the husband was dead.—But in the case of *St. John's, Wapping, and St. Botolph's, Bishopsgate*<sup>2</sup>, it was adjudged as follows: Margaret having gained a settlement in St. Botolph's parish, by hiring and service, afterwards married Thomas Kinley, an Irishman, who had no settlement in England. About two years ago the husband entered on board a man of war destined to the West Indies, but Margaret, about two months ago, heard he was living, and the question was, whether her settlement which she had before marriage ceased, or was in suspense during the coverture, and she should be looked upon as a casual poor, or she should be sent to the place of her settlement before marriage? After full consideration, Rider, c. j. delivered the opinion of the court.—(1.) It is certain St. Botolph's was once her settlement, and that is not disputed. (2.) That settlement continues till she gains a new one. (3.) She has never yet gained a new one.—To the second point he said, a settlement is a permanent thing, it lasts during life, or till a new one is acquired; and there is no case to be found where it has been determined or ceased sooner. Neither can any person discharge his own settlement sooner,

<sup>9</sup> Cases of Session, 98.      <sup>1</sup> H. 12 G. II.    <sup>2</sup> Sess. C. 185.

<sup>3</sup> H. 28 G. II. Burn's J. Art. Poor (Sett. by Marr.)

or by any other means. The question is not, whether she gained any new settlement by marriage, but whether her old settlement was discontinued by her marriage with a person who had none? It is absurd to say she shall lose her own, without getting another. The objection that the husband and wife would be separated is of no weight here, for they are separated already. I must own the case of *Stretford and Norton* is not to be distinguished from the present, and is against our present opinion. To be sure we must have great regard to former resolutions in this court; but we must judge upon the cases before us. How the case came to be determined so I do not know, but there are at least four authorities the other way, (which perhaps might not be cited) and we think the reason is with the old cases. The husband may come to her in the one parish as well as in the other, for he will be a vagrant in both, and liable to be treated as such. The wife's settlement is only suspended during her husband's continuance with her, and when he leaves her it revives.

A person not removable for forty days, generally thereby gains a settlement, but to this rule there are many exceptions: for a servant gains no settlement unless he serve a full year; a bastard gains no settlement by continuing forty days with his mother for nurture; and a wife residing on her husband's estate, thereby gains no settlement in that parish. So a certificate person, or one residing upon a purchase under the value of 30*l*, and not actually chargeable, though they are irremovable, yet by such residence they acquire no settlement<sup>1</sup>.

If a certificate man's wife have an estate devised to her for life, and she and her husband enter thereon, and live there

<sup>1</sup> Burn's J. Art. Poor (*Sett. by Marr.*)

more than forty days in continuance, he thereby gains a settlement notwithstanding the certificate <sup>u</sup>.

*Settlement of a Wife.*

**N**O person can acquire any settlement in any parish or place by virtue of any purchase of any estate or interest in such parish or place, whereof the consideration for such purchase doth not amount to the sum of 30*l.* bona fide paid, for any longer or further time, than such person shall inhabit in such estate, and shall then be liable to be removed to such parish or place, where he was last legally settled, before the said purchase and inhabitancy therein <sup>v</sup>. But a cottage and ground conveyed by a father to his daughter, and entered upon and possessed by her husband in her right, gives him a legal settlement in the parish where such cottage is situated, notwithstanding this act <sup>w</sup>. The word purchase in the act is not to be taken in the largest extent of it, but is confined to cases where a pecuniary consideration is paid, otherwise no devise, or gift, or settlement on marriage would gain a settlement unless there were a pecuniary consideration paid. The intention of the act was to prevent settlements by purchase for small money considerations <sup>x</sup>.

A certificate man purchasing jointly with his wife a house and ground for less than 30*l.* by laying out in repairs and improvements of whatever kind, so much as shall cause his purchase to be taxed after the rate of a tenancy of 30*l.* value, and residing in the same till his death, although his widow continue more than forty days in possession of such estate, and afterwards sells a part of it for upwards of 30*l.* reserving part to herself, but removes out of the same to another house

<sup>u</sup> Case of K. & St. Mary, Berkhampstead, H. 2 G. II. Burrow's Set. Ca. 462.

<sup>v</sup> 9 G. I. c. 7. s. 5.

<sup>w</sup> Bur. Set. Ca. 386.

<sup>x</sup> Case of Marwood

& Kentishbury, H. 29 G. II. Rider C. J.



in the same parish, such woman gains no settlement in the parish, but shall be removed to the parish from whence her husband gained his certificate; for the court determined that the whole question was whether the woman was a *bona fide* purchaser of an estate of 30l. value, agreeable to the act, she did not come to it by descent or executorship, but she and her husband were joint purchasers. They took jointly, and by entirety, and not by moieties. Therefore she can only stand in the same situation that her husband did, which is that of a purchaser; and the value according to the act is fixed by the purchase-money actually paid, and no money afterwards laid out can make the prior purchase of a greater value than it really was at the time of making it; therefore she gained no settlement by this purchase<sup>y</sup>.

*Women may be compelled to go to Service.*

**A**NY woman of the age of twelve, and under forty, unmarried, and capable of service, may be compelled to go to service, by the year, or by the week or day; and two justices, or the mayor, or other head officer of a town corporate, are empowered to fix the rate of her wages, and to commit her if she refuse to serve<sup>z</sup>; and if a woman who is a servant shall marry, yet she must serve out her time, and her husband cannot take her out of her master's service<sup>a</sup>. And in such a case, and in all cases generally, if a person retain a servant without expressing any time, the law shall construe it to be for one year<sup>b</sup>.

*Settlement of Soldier's Wives and Children.*

**I**F any non-commissioned officer or soldier shall have wife, child or children, two justices may summon him where he is quartered, to make oath of the place of his last legal settlement; who shall obey such summons, and make oath

<sup>y</sup> Case of Dunchurch and South Kilworth, &c. 6 G. III. Burrow's Set. Ca. 553.    <sup>z</sup> 5 Elix. c. 4. s. 24.    <sup>a</sup> Wood, b. 1. c. 6.    <sup>b</sup> Dalt. c. 58.  
<sup>2</sup> Inst. 42.

accordingly. And the justices shall give an attested copy of such affidavit to be delivered to the commanding officer, to be produced when required. And being summoned again, he shall not take another oath with regard to his settlement, but shall leave a copy of the former.<sup>c</sup>

*Women Vagrants.*

**W**OMEN wandering and begging in parishes and places to which they do not belong, if any such be delivered of a child or children, and become chargeable, the churchwardens or overseers, may detain such woman in their custody, until they can safely convey her to a justice, who shall examine her, and commit her to the house of correction until the next session; who may if they see convenient, order her to be publicly whipped, and detained in the house of correction for any further time not exceeding six months<sup>d</sup>.

*Of Gypsies.*

**T**HESE are a counterfeit kind of rogues, that being English or Welch people, accompanied themselves together, disguised in the habit of Egyptians; blacking their faces and bodies, and framing to themselves an unknown tongue, wander up and down, under pretence of telling fortunes, abusing the ignorant common people, and stealing all that they can lay their hands on. These are punishable as vagabonds and beggars<sup>e</sup>.—These are a strange kind of commonwealth among themselves, of wandering impostors and jugglers; who made their first appearance in Germany about the beginning of the 16th century, and have since spread themselves all over Europe and Asia. They were originally called Zinganus by the Turks, from their captain Zinganeus, who when sultan Selim conquered Egypt about the year 1517, refused to submit to the Turkish yoke,

<sup>c</sup> 7th Art. of War.

<sup>d</sup> 17 Geo. II. c. 5. s. 25.

<sup>e</sup> 1 P. & M. c. 4.

<sup>f</sup> 5 Eliz. c. 20. 39.—c. 4. s. 2. 17 Geo. II. c. 5. s. 2.

and retired into the desarts, where they lived by rapine and plunder, and frequently came down into the plains of Egypt, committing great outrages in the towns upon the Nile, under the dominion of the Turks. But being at length subdued and banished from Egypt, they dispersed themselves in small parties, into every country in the known world; and as they were natives of Egypt, a country where the occult sciences, or black art, as it was called, was supposed to have arrived to great perfection, and which in that credulous age was in great vogue with persons of all religions and persuasions; they found the people, wherever they came, very easily imposed upon<sup>f</sup>. In the compass of a very few years, they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging and pilfering, that they became troublesome and even formidable to most of the states of Europe. On which account they were expelled from France in the year 1560, and from Spain in 1591; and the government in England took the alarm much earlier; for in 1530, they are described by the statute 22 Hen. VIII. c. 10. as “ Outlandish people calling themselves Egyptians; using no craft or feat of merchandize, who have come into this realm, and gone from shire to shire, and place to place, in great company, and used great, subtle, and crafty means to deceive the people, bearing them in hand, that they by palmestry could tell mens and womens fortunes; and so many times by craft and subtilty have deceived the people of their money, and also have committed many heinous felonies and robberies.” Wherefore they are directed to avoid the realm, and not to return, under pain of imprisonment, and forfeiture of their goods and chattels; and upon their trials for any felony which they may have committed, they shall not be entitled

<sup>f</sup> Mod. Univ. Hist. Vol. XLIII. pa. 271.

to a jury *de medietate linguæ*. And afterwards it is enacted, 1 & 2 P. & M. c. 4 & 5 Eliz. c. 20. that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. and if the Egyptians themselves remain one month in this kingdom, or if any person being fourteen years old, whether natural born subjects or a stranger, which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times, it is felony without benefit of clergy. And Sir Matthew Hale informs us<sup>a</sup>, that at one Suffolk assizes, no less than thirteen gypsies were executed upon these statutes, a few years before the restoration. But to the honour of our national humanity, there are no instances more modern than this of carrying these laws into execution<sup>b</sup>. Scotland alone seems to have afforded a friendly assylum for these emigrants, for in the year 1594, a letter patent by king James VI. of Scotland, afterwards king James I. of England, was granted to the leader and head of these people, wherein he is styled *our beloved John Faw, lord and earl of Little Egypt*, which is now extant among the writs of privy seal. And the same Faw appears to have been honoured long before that time, by the countenance and protection of Mary Queen of Scots, as the same record contains a writ of a similar tenor, dated 25 April, 1553; and 8 April, 1554, he obtained a pardon for the murder of Ninian Small. So that it appears, that he had continued long in Scotland, (or perhaps some part of the time in England) and it is possible, that from him this kind of strolling people might receive the denomination which they still retain of FAW-GANG<sup>c</sup>. The act 17 Geo. II. c. 5. commonly known by the title of the Vagrant Act, regards gypsies only under the general denomination of rogues and vagabonds.

<sup>a</sup> 1 P. C. 671.<sup>b</sup> 4 Blackst. c. 13.<sup>c</sup> Burn's Just. tit. Vagrants.

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THE  
L A W S  
RESPECTING  
W O M E N.

---

BOOK THE SECOND.

*Of the Laws respecting the Property of Women.*

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CHAP. I.

*Ancient Laws of Descent affecting the Interests of Women.*

SOME ancient states made no distinction between males and females, as to their right of inheriting from their ancestor: but the more general rule, which prevailed among the Greeks and Romans, was for sons to inherit in preference to daughters. Indeed by the Salic law, and others, where feuds were strictly maintained, females were totally excluded, because they were incapable of performing those military services to the prince, for the rendering

dering of which such feuds were granted<sup>a</sup>. According to the feudal system as it was introduced into England by William the Conqueror, lands were always granted by the prince to his followers in arms; and the terms on which lands were held in those times were, that the possessor should accompany his prince when called upon; himself completely armed, and bringing with him a number of attendants or vassals, according to his rank, and the quantity of land he was invested with. Consequently women not being capable of bearing arms, were incapacitated from holding lands, and could not succeed to a genuine feud. When in process of time these feuds became hereditary, women were acknowledged heirs on failure of heirs male. But originally, in the early times of the Gauls, from whence such tenures sprang, they were held at the mere pleasure of the prince; afterwards they were continued from year to year: but as the condition of these migrating people grew to be more settled, feuds acquired a longer perpetuity. According to the strict feudal establishment, every vassal who held lands under a lord, was obliged to portion off the eldest daughter of that lord: but in those days such dowers were extremely slender. Indeed this obligation was universal upon all such as held feudatory lands; and monastries were subject to this demand until their dissolution in the reign of Henry VIII.<sup>b</sup> The same custom also prevailed in the Roman republic, for the client was bound to portion off his patron's daughter<sup>c</sup>. Nor was the precise sum to be given on this occasion settled till the reign of Edw. I. when it was fixed to be what was the supposed twentieth part of every knight's fee, or 20s.<sup>d</sup> And tenants in soccage, by the same statute, were subject to pay 20s. for every 20l. per

<sup>a</sup> 2 Feud. 55. Blackst. b. 11. c. 14.

<sup>c</sup> P. Manutius de Senat. Rom. c. 1.

<sup>b</sup> Philips's Life of Pole, I. 223.

<sup>d</sup> West. L. 3 Ed. I. c. 36.

annum, so held. Feuds descendable to females were styled improper or derivative feuds, which were held upon a rent in lieu of military service. In the early periods of our history, the inferior commonalty appear in many instances to have been little better than slaves, dependant on the will of their lord. Every lord of a manor allotted to his inferior tenants, who were styled villeins, (either from the word *villis*, or else, according to Sir Edw. Coke, 1 Inst. 116 *a villa*, because they lived chiefly in villages, and were employed in rustic works of the most sordid kinds) some districts of land, by the cultivation of which themselves and families were to be supported. They were debarred the privilege of leaving their lord, in case his service was irksome to them; and if they ran away, he might claim and recover them in the same manner as any of his cattle<sup>e</sup>. A villein could acquire no property either in lands or goods; but if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use; unless he contrived to dispose of them again before the lord had seized them, for the lord had then lost his opportunity<sup>f</sup>. In many places also a fine was payable to the lord if the villein presumed to marry his daughter to any one, without leave from the lord; and by the common law, the lord might also bring an action against the husband for damages, in thus purloining his property. For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*. In case of marriage between a freeman and a neife; or a villein and a freewoman, the issue followed the condition of the father; being free if he was free, and villein if he was villein. But

<sup>e</sup> Litt. Sect. 123.

<sup>f</sup> Litt. Sect. 177.

no bastard could be born a villein, because the law considering him as the son of no one, and therefore incapable of gaining any inheritance, it did not suffer him to lose his natural freedom, on account of his birth. The person of villeins were protected by the law, against atrocious injuries committed by the lord : for he might not kill or maim his villein, but he might beat him with impunity : for the villein had not action or remedy at law against his lord, except for the murder of his ancestor, or the maim of his own person. Neifes indeed had also an appeal of rape, in case the lord violated them by force<sup>s</sup>. It is a matter of doubt, whether the feudal system which prevailed after the Norman invasion ; or the Danish and Saxon laws, rendered the conditions of villeins most slavish. And it is generally believed that anciently the lord of a fee claimed a right of enjoying his tenants wife on the nuptial night, and though such licentious abuse of power and authority is not expressly authenticated by any writer of undoubted credit, yet the gross treatment which the inferior order of people received from those of high rank, may serve to corroborate the fact as it is now supported, especially as it cannot be doubted to have prevailed in Scotland, where it was styled *mercheta*, or *marcheta*, and was there abolished about the year 1060<sup>b</sup> ; and it has been conjectured that the peculiar nature of burgage tenure, which is also styled *borough English*, and gives the inheritance in succession to the youngest son instead of the eldest, was founded on the established right thus claimed by the lord, the legitimacy of the younger children being on that account less liable to impeachment.

<sup>s</sup> Co. Litt. 160. Litt. Sect. 202, 290. Blackst. b. II. c. 6.      <sup>b</sup> Seld. tit. of Hon. 2. 1. 47. Reg. Mag. l. 4. c. 31.



## C H A P. II.

*The present Doctrine of Descent respecting Women.*

**S**ONS inherit a real estate in preference to daughters ; but in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed. When an estate descends to daughters, in default of a male heir, such females inherit in coparcenary. The true reason for preferring the males must be deduced from feudal principles which have been before touched upon. If a man has two daughters, one of whom dies leaving six daughters, after which the father dies leaving no other children ; the six daughters shall take among them exactly the same that their mother would have done had she been living ; that is, a moiety of the lands of their grandfather, in coparcenary ; or one twelfth part of the whole to each one of them ; or if a man die having for his next of kin six nieces by three sisters ; three by one sister, two by another ; and one by a third ; his inheritance must be divided into three parts, and one-third distributed to the three nieces the representatives of one sister ; another third to the representatives of the other ; and a third to that child who is the sole representative of her mother. If upon failure of lineal heirs, an inheritor is sought from a collateral line, and it is uncertain whether the estate descended by the male or female branch, then the male line shall be traced *ad infinitum* for an heir before the female line is resorted to at all. But when the descent is well known to have been by the mother, her relations are in like manner sought, and the father's relations can by no means inherit at all.

*Estates Tail.*

**E**STATES tail may be either general ;—or general to male, or to female ;—or special ;—or special to male, or to female ;—or, *in libero maritagio*, or frankmarriage. The latter of which is now grown out of use ; notwithstanding it is still capable of subsisting in law. Tail general is, where lands and tenements are given to one, and the heirs of his body begotten. By which manner of bequeathing, how often soever the donee in tail marries, his issue by every such marriage is in successive order capable of inheriting the estate tail *per formam doni*. If lands are given to a man, and the heirs male of his body begotten, it creates an estate in tail male general : and *vice versa*, an estate tail female general. Tenant in tail special is, where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. As, where lands and tenements are given to a man, and the heirs of his body, on Mary his wife to be begotten ; hereby no issue can inherit, but such special issue as is engendered between them two ; not such as the husband may have by another wife : and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee ; but they being heirs *to be by him begotten*, this makes it a fee tail ; and the person being also limited, on whom such heirs shall be begotten, (*viz. Mary his present wife*) this makes it a fee tail special. If an estate be given to a man and the heirs female of his body on his present wife to be begotten, this is an estate in tail, female special. In case of an entail male, whether general or special, the heirs female can never possibly inherit ; neither any derived from them ; nor the heirs male in case of an  
estate

estate given in tail female, whether general or special<sup>i</sup>. As the word *heirs* is necessary to create a fee, so, in further imitation of the strictness of feodal donations, the word *body*, or some other words of procreation, are necessary to make it a fee tail; by ascertaining to what heirs in particular the fee is limited. If therefore either the words of inheritance, or words of procreation be omitted, notwithstanding the others are inserted in the grant, this will not make an estate-tail. As if the grant be to a man *and the issue of his body*, to a man, and *his seed*, to a man and *his children*, or *offspring*: all these are only estates for life, there wanting the words of inheritance, *his heirs*. So on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee simple, and not in fee tail; for there are no words to ascertain the body out of which they shall issue. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his seed; or to a man and his heirs male; or by other irregular modes of expression<sup>k</sup>. Frank-marriage is defined by Littleton to be where tenements are given by one man to another, together with a wife who is the daughter or cousin of the donor, to hold in frankmarriage. Now, by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word *frankmarriage*, does, *ex vi termini*, not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity is past between the issues of the donor and donee<sup>l</sup>. A

<sup>i</sup> Litt. sect. 16, 21, 22, 26, 27, 28, 29. Black. b. II. c. 7.      <sup>k</sup> Co. Litt. sect. 20, 27. Litt. sect. 31. Blackst. b. II. c. 7.      <sup>l</sup> Litt. sect. 17, 19, 20. Blackst. U. S.

tenant in tail may commit waste on the estate tail; by felling timber, pulling down houses, or the like, without impeachment of waste.—The wife of a tenant in tail shall have her dower, or thirds of the estate tail.—The husband of a female tenant in tail, may be tenant by the courtesy of the estate tail.—An estate tail may be barred or destroyed by a fine; by a common recovery; or by lineal warranty descending with assents to the heir <sup>m</sup>.

Besides the natural death of a person, there is likewise a civil death; where the man, though living, is adjudged to be dead in law. As, where he enters into religion; or is attainted of high treason. If any person for whose life an estate has been granted, remains beyond sea, or is otherwise absent seven years; and no proof had of his being living; such person shall be accounted naturally dead. Though if the party be after proved living, at the time of eviction of any person, then the tenant may re-enter, and recover the profits. And persons in reversion or remainder after the death of another, upon affidavit that they have cause to believe such other to be dead, may move the lord chancellor to order the person to be produced; and if he be not produced, he shall be taken as dead, and those claiming may enter <sup>n</sup>.

A man seised of lands in right of his wife; if the wife is attainted of felony, the lord shall enter and oust the husband; he gains nothing but a bare reception of profits till issue had; after issue he has estate for life <sup>o</sup>.

Husband and wife tenants in special tail; the husband is attainted of treason and executed, leaving issue; the wife dies, the lands shall escheat, because the issue in tail ought

<sup>m</sup> West. 2 Co. Litt. 224.

<sup>n</sup> 19 Car. II. c. 6.

<sup>o</sup> Case of Parsons & Ferns, M. 22 Car. II. Mod. 91. pl. 59.

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to make his conveyance by father and mother; and from the father he could not by reason of the attainder. A, seised in fee of lands, died without issue, brother or sister; but left two cousins his heirs at law, one of whom was his own mother. The master of the rolls held, that this mother might inherit immediately as heir, in capacity, or relation of cousin. And he further observed, that the other cousin being but half an heir, could not take the whole, nor could any thing go to the lord by escheat; for as long as there is any heir he cannot take, so that though the other cousin could take but a moiety, yet her being a moiety of an heir, would prevent the lord's title by escheat, and that though this was a very uncommon case, he took it to be a clear one<sup>a</sup>.

It hath been thought as there can be no moieties between husband and wife, of an estate given to them during their marriage; that if the husband be attainted and executed, the wife shall by her petition regain all such lands, conveyed jointly to her and her husband<sup>b</sup>.

Natural affection is a good consideration in a deed; and if one without expressing any consideration covenants to stand seised to the use of his wife, child, or brother; here, the naming them to be of kin implies the consideration of natural affection whereupon such use will arise<sup>c</sup>. If lands are given to a man and woman unmarried; and the heirs of their bodies; this is a tail special; because of the possibility that they may marry; and then the descendants of that marriage can only inherit. So if the gift be made to a man that hath a wife, and to a woman that hath a husband, and the heirs of their bodies; this is a tail-special presently in them; from the possibility that they may marry, and the

<sup>a</sup> P. E. 16. Eliz. Dyer 332.

Co. Litt. 187.

<sup>b</sup> Case of Eastwood & Vinke. 2 P. W. 613.

<sup>c</sup> Carth. 138.

descendants of such marriage may inherit according to the limitation of the gift<sup>u</sup>. But if land be given to two men and their wives, and the heirs of their bodies begotten, they have a joint estate for life ; and several inheritances, but no joint estate in tail, because though the husband of one, and the wife of the other, may die, and the survivors may marry, yet the gift being made to them all, and the heirs of their bodies, it is impossible that there should be one heir or descendant of all their bodies ; and therefore it can be no joint estate-tail in them all ; but they all four take jointly for life ; and each husband and his wife have a several inheritance in a moiety<sup>v</sup>. If lands be given to two men, and the heirs of their bodies begotten, they have but a joint estate for life, and several inheritances ; for though the gift is limited to the descendants of their bodies, they cannot have a joint estate-tail<sup>w</sup>.

So if lands are given to one man and two women, and the heirs of their bodies begotten ; they have a joint estate for life, and several inheritances ; because there can be no one issue of both the women's bodies ; and if the man should marry one of them, yet it is not limited in the donation which of them should first take, in case of such inter-marriage<sup>x</sup>.

If lands are given to a man and his wife, and the heirs male of the body of the husband begotten, this is an estate-tail in the husband, and but an estate for life in the wife. So if the limitation is to the heirs male of the wife by the husband, it is an estate for life in the husband, and an estate in tail to the wife. For to whichever's body the word *heirs* inclines by the limitation, it creates a descendible estate

<sup>u</sup> Co. Litt. 256. Bro. ER. 22.

<sup>v</sup> Plowd. 35.

<sup>w</sup> Litt. sect. 185.

<sup>x</sup> Co. Litt. 25.

in such person : but if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in both of them. If lands be given to a man, and the heirs male of his body ; remainder to him, and the heirs female of his body, and he hath issue a son, who hath issue a daughter, who hath issue a son, such daughter's son can inherit neither of these gifts, because whoever claims as heir to such a gift, must convey his descent wholly through males ; from which the son cannot do in such case, because he must necessarily show himself a descendant of the daughter, before he can make himself heir to the first son : nor can he inherit the tail female, because that limitation being to that particular sort of heir, no male, though the immediate descendant of a female, can inherit, because he is another sort of heir than is described in the donation <sup>v</sup>,

### C H A P. III.

#### *Property of single Women, or Spinsters.*

**I**F any person take by force, or otherwise, any woman sole, having any substance of lands, tenements, or moveable goods, and enforce her before she be at liberty to bind herself to him by statute or obligation, such bond shall be void <sup>u</sup>. An unmarried woman, whether spinster or widow, is styled in the language of the law, a *feme sole*. If land of inheritance descends to two or more persons from the ancestor, it is styled, an estate held in coparcenary : which may either arise at common law, or from particular custom ;

<sup>u</sup> Co. Litt. 256.

<sup>u</sup> 31 H. VI. c. 9.

such as gavelkind, of which see the fourth book. If a person seised in fee simple or in fee tail dies, and his next heirs are two or more females; his daughters, sisters, aunts, cousins, or their representatives; in such case they shall all inherit, and these co-heirs are then called *coparceners*, which is abbreviated to *parceners*. All such parceners, whether by common law or particular custom, make but one heir, and have but one estate among them<sup>a</sup>. The properties of parceners are in some respects like joint-tenants, they having the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own land: and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any waste by a writ of partition; but till the statute of Henry the Eighth, joint-tenants had no such power. Parceners also differ materially from joint-tenants, in the following particulars.—They always claim by descent; whereas joint-tenants always claim by purchase. Therefore if two sisters purchase lands, to hold to them and their heirs, they are not parceners but joint-tenants. And hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy.—There is besides no unity of time necessary to an estate in coparcenary; for if a man hath two daughters to whom his estate descends in coparcenary, and one dies before the other, or when both are dead, their two heirs are still parceners; the estates vesting in each of them at different times, though it be the same quan-

<sup>a</sup> Co. Litt. 163.



city of interest, and held by the same title.—Again, parceners, though they have an unity, have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety, and of course there is no *ius accrescendi*, or survivorship between them : for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants thereof, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty ; and if one parcener alienes her share, though no partition be made, then are the lands no longer held in coparcenary, but in common <sup>b</sup>. —Richard Gilbert, and Frances Sophia Gilbert, brother and sister, were seised as joint-tenants in fee of a house, &c. in Welclose Square. Richard Gilbert, on the 20th of January 1754, made his will, duly executed, and thereby devised in these words : “ Imprimis, I give and bequeath all my part, right, title and interest, which I have in an estate jointly with my sister Frances Sophia Gilbert, situated, &c. to my beloved wife Jane Gilbert.” By indentures of lease and release, dated the 9th October in the same year, they made partition ; and the messuages in question were conveyed to Richard Gilbert in fee. Richard died in 1757 without issue, leaving his sister, who as heir at law, claimed the premises : the wife claimed under the will.—Mr. Ashurst for the plaintiff argued, that a joint-tenant cannot devise, though a coparcener may ; for the right of survivorship takes place of a joint-tenant’s devise : which is settled, established law. And the deed of partition made subsequent to the time of making the devise, cannot effectuate and make good a prior devise, which was a bad one when made :

<sup>b</sup> Lit. sect. 254, 309; Co. Lit. 164, 174, 188. 2 Inst. 403.

for upon the statutes of wills, a will must be good at the time when it is made, it cannot be made good by any subsequent event. There ought therefore to have been a republication ; for at the time of making this will the joint-tenant had not the estate in the mode that was necessary to qualify him to devise it. Joint-tenancy is a personal disqualification to devise land ; as infancy, insanity, or coverture are. And it is tacitly excluded by the statute, by not being therein expressed as coparcenary, and tenancy in common are<sup>c</sup>. Mr. Hervey for the defendant, the wife, argued ; that when a devise depends upon the quality of the estate, it then turns upon the time of the will operating, not on the time of making the will. And he said, the case of lapsed devises, where a devisee in fee dies in the life of the devisor, tends to prove this point : but a much stronger instance is the case of a man's devising to his own wife, which can only be supported upon this ground, namely, considering the estate as it stood at the time of the will operating. So if a devise be to the heir of A, and A dies in the life-time of the testator, A's heir shall take. The present case turns upon the quality of the estate, and therefore the devise is good without republication, or any other act done, as the testator was sole seized at the time of the operation of the will. Indeed where it depends on the personal ability or disability of the testator, some other act must be done after the disability is removed. But where it depends on the quality of the estate, the estate is disencumbered by the removing of the disabling circumstance : and it is enough if it is clear of any incumbrance at the time when the will operates. Here the devisor was in to the same uses after the partition as he was before ; his intention remained the same as it was before ; and the establishing the devise would not

<sup>c</sup> 34 Hen. VIII, c. 5. s. 4.

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clash with any rule of law. Lord Mansfield, and the c were clearly and unanimously of opinion, that a will made by a joint-tenant during the continuance of the joint-tenancy, is not a good will even as to his share of the estate, under the statute of wills, notwithstanding a subsequent severance of the joint-tenancy by a partition made after the time of making the will, and before the testator's death, unless there be a republication of it after the partition. And they observed, that the deviser expressly describes this bequest as a right which he had in the estate jointly with his sister<sup>d</sup>.

It must however be observed, that an estate given to a daughter in frankmarriage bars her inheriting from the same ancestor from whom she received the former estate, an equal share of the inheritance in coparcenary, unless the lands so given in frankmarriage are equally divided with the rest of the lands. The language of the law on such occasions is bringing the *lands into hotchpot*; which word, says Littleton, signifies in English, a pudding; "for in a pudding is not commonly put one thing alone, but one thing with other things together." This homely phrase, however, meant to signify, that the lands, both those in frankmarriage, and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But if the daughter inheriting in frankmarriage did not choose to put her lands in hotchpot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters<sup>e</sup>. The law of hotchpot took place then only, when the other lands descending from the ancestor were fee simple; for if they

<sup>d</sup> Swift ex demiss. Neale et Ux. against Roberts. 3 Bur. Mansf. 1488  
<sup>e</sup> Sect. 267.      <sup>f</sup> Bracton, l. 2. c. 34. Litt. Sect. 266, 273.

descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotchpot. And the reason is, because lands descending in fee simple are distributed by the policy of laws for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance equal to the rest, it is not reasonable that she should have more: but lands descending in tail, are not distributed by the operation of law, so properly as *per formam doni*; it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotchpot; for no others are looked upon in law for the advancement of the woman, or by way of marriage portion<sup>a</sup>. But as gifts in frankmarriage are now out of use, the law of hotchpot of course has ceased with them; but the statute for the distribution of personal estates revived this mode of division. An estate held in coparcenary may be dissolved by partition; alienation of one parcener; or by the whole vesting in one single person. There are several methods, according to Littleton<sup>b</sup>, of making partition of an estate so held. The parceners may agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part.—Or they may nominate some friend to make partition for them; in which case the sisters in parcenary shall choose their respective parts according to seniority of age; or otherwise as shall be agreed. But this privilege of seniority is then personal; for if the eldest sister is dead, her issue shall not choose first, but the next sister. But if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone before the younger<sup>c</sup>. And the reason given is

<sup>a</sup> 8. Litt. Sect. 274. Blackst. b. II. c. 13.

<sup>b</sup> Sect. 243, 264.

<sup>c</sup> Co. Lit. 164. 5, 6. Rep. 22.

that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition, and therefore is merely personal; the latter of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also.—Another method of partition is, where the eldest divides; in which case she shall choose last, according to the rule of law, *cujus est divisio, alterius est electio*.—Or the sisters may agree to cast lots for their shares, and take according as shall be thereby awarded.—But if the parceners are not agreed to make a division, such one or more of them as are desirous of a partition may sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanelled; and shall assign to each of the parceners her part in severalty. And the statute law hath now supplied the deficiencies of the common law process in such cases <sup>k</sup>; by establishing an easier method of carrying on the proceedings on a writ of partition. Some things there are, in their very nature impartable. Such are the mansion-house; common of estovers; common of piscary uncertain, or any other common without stint. These the eldest sister may make her election of if she pleases, upon rendering to the others a reasonable satisfaction in other parts of the inheritance; or if that cannot be, then they shall have the profits of the things by turns, in the same manner as they take an advowson <sup>l</sup>.

The right in an advowson, if severed from a manor, becomes in gross; which may return to the manor on certain contingencies. Thus if the manor be allotted to one parcener, and the advowson on that manor to another; and the parcener who had the advowson dies without issue, it be-

<sup>k</sup> 8 & 9 W. III. c. 3.

<sup>l</sup> Blackst. b. II. c. 12.

comes appendant again. In like manner, if the demesnes are allotted to one parcener, and the service to the other; if the parcener of the demesnes dies without issue, and the manor descend to her who had the service, the advowson becomes appendant as it was before. And where any two coparceners of a manor to which an advowson is appendant, make partition of the manor without taking notice of the advowson, at every other turn it is still appendant; but otherwise if any particular exception to an advowson is made; it being then in gross <sup>m</sup>. Advowsons in gross cannot descend from the brother to the sister of the entire blood, but the same shall descend to the brother of the half blood, unless the first had presented to it in his life-time; and then it shall descend to the sister; she being the next heir of the entire blood <sup>n</sup>. Where there are diverse patrons, and they vary in their presentation, if they are joint-tenants, or tenants in common of the patronage, the ordinary is not bound to admit any of their clerks; and if the six months pass, then he may present by the lapse: but he may not present within the six months, for if he do, they may agree, and bring a *quare impedit* against him, and remove his clerk, and so the ordinary shall be a disturber <sup>o</sup>. But by the common law, if a patron has the patronage by descent, as coparceners, then is the ordinary bound to admit the clerk of the eldest sister, for the eldest shall have the preference in the law if she will; and then at the next avoidance, the next sister shall present; and so by turns one sister after another, till all the sisters, or their heirs, have presented; and then the eldest sister, or her heirs, shall begin again; and this is called a presenting by turns, and is the constant method observed between coparceners in an advowson, excepting they agree to present together, or in some other manner, and if they do so, the

<sup>m</sup> Gibb. 757.<sup>n</sup> Watf. c. 8.<sup>o</sup> Doct. & Stu, b. 9, p. 30.

agreement must stand. But if after the death of the common ancestor, the church voided, and the eldest sister presented together with another of the sisters, and the other sisters every one in their own names or together; in that case the ordinary is not bound to receive any of their clerks, but may suffer the church to lapse; for he shall not be bound to receive the clerk of the eldest sister, but where she presented in her own name singly <sup>p</sup>. But where the right of presentation is in joint-tenants, or tenants in common, and there hath been no composition in writing to present by turns, they must of necessity join in the presentation; for if they present singly the bishop may refuse the clerk <sup>q</sup>. This privilege of the elder sister to present first in turn goes to her assignee.—An estate descended to two daughters as parceners; the church became vacant twice in their time, and both joined in presentation: the elder sister married; settled her own estate, and died. The other married before it became again vacant, and made a settlement of her part. A vacancy happening, the husband of the elder claimed a right to present as tenant by the courtesy to her estate, and actually did present. The bishop objected to his clerk, because the younger sister and her husband claiming an equal right to presentation as tenants in common, did not join; so that there being a litigation, he was willing to admit the person appearing to have right in a court of law. By Mr. baron Clarke, in the absence of the master of the rolls: I have always thought that the many alternate presentations in this kingdom, must have arisen from an estate descending in parcenery, where advowsons are upon them. It is the only estate that I know of, which in course, and by operation of law only, falls on several persons making but one heir, without the intervention of conveyances by will or

<sup>p</sup> 1 Inst. 186, 243. 2. 364.

<sup>q</sup> 1 Inst. 186. Gibb. 79.

otherwise of the owner of the estate; which makes it, although in some instances partaking of a tenancy in common, different from that and from a joint tenancy, which are made by conveyance, and descendible in a different manner. An advowson is a particular sort of estate so descending. And as it is impossible to be divided into parts, so as to be enjoyed separately, it is natural to follow the course that has been practised, that each parcener shall have a turn to present, and to prevent confusion, begin with the elder; and in all the cases where disputes have arisen, whether the alienage of the elder sister should have the same privilege, or whether it should go to the next sister, it hath been determined in favour of the alienage.

When an advowson descends to parceners, though one present twice, and usurp upon her co-heir, yet she who was negligent shall not be clearly barred, but another time shall take her turn to present when it becomes vacant<sup>1</sup>. The clerk of a coparcener being once complete incumbent, though he is afterwards deprived, the turn is served; and so it is where by reason of some incapacity the institution was voidable by sentence declaratory, but not void, (as hath been held in case a layman is presented) because the church is full until such sentence comes. But if after presentation, institution, and induction, the church remains not only voidable, but by special declaration of the law merely and actually void, (as for not reading the articles, and the like) there the turn is not served; but the presenter may present again, because the church was never full<sup>2</sup>. If the person presented by a coparcener, is incumbent, and deprived, and the next presents; notwithstanding that the second is com-

<sup>1</sup> 1 Vezey, 340.  
5 Co. 102.

<sup>2</sup> 13 Edw. I. St. 1. c. 5. Sect. 5.

<sup>3</sup> Gibf. 764.



plete incumbent, yet if he is deprived, and the first restored, the turn is not served ; because the restoring of the first is a re-continuing of his incumbency upon the footing of the former presentation, institution, and induction, who also dying incumbent will be the last presentee<sup>u</sup>.

If coparceners, or joint-tenants, or tenants in common, are seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition shall be made between them to present by turns ; thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn : as, if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn ; the other of the other moiety to present in the second turn : in like manner if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn<sup>v</sup>.

Where an ancestor dies seised of lands in fee simple, which descend to two sisters, as coparceners ; and one of them enters before the other, and will not suffer her sister to enter and enjoy a moiety ; this is a deforcement, and may be remedied either by a peaceable entry on the premises, or by a writ of entry or assise.

A having three daughters, B, C, and D, entails his land upon them ; afterwards C marries, and being a feme covert, agreed, with consent of her husband, to take a thousand pounds in consideration of extinguishing her right as coheir. The judges, by their certificate, held it to be no bar to her<sup>w</sup>.

<sup>u</sup> Gibs. 765.

<sup>v</sup> 7 Ann, c. 18.

<sup>w</sup> Toth. 162.

If there are two coparceners, and one of them releases all her right to the other, without the word *heirs*, this passes a fee; for each parcener till partition, is seised of the whole estate in fee, though each of them hath right, or legal demand to the fee of a moiety only. When therefore one releases all her right, it hath a necessary relation to the estate whereof the other is seised, and to which she hath a right, which is the fee <sup>x</sup>.

If there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age; partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution <sup>y</sup>.

If a man makes a voluntary settlement for the portion of a daughter by a former wife, and then takes a second wife, and settles the same land for her jointure without notice of the portion, and by his will devises other lands to his wife which she refuses, the daughter shall have the other lands till her portion is raised <sup>z</sup>.

If A, by marriage settlement makes provision for daughters of 1500l. each, to be paid at their respectively arriving at eighteen years of age, or on marriage; and if any of them die before such age, or unmarried, the survivor to take the whole; and afterwards settles other lands for the payment of the same sum at the age of twenty-one years, or on marriage; and that there shall be no survivorship, this controls the first deed <sup>a</sup>.

If a term is limited after the death of a father upon trust, for raising portions for his daughters at the age of eighteen,

<sup>x</sup> Co. Litt. 9.

<sup>y</sup> Idem, 290.

<sup>z</sup> 1 Vern. 219.

<sup>a</sup> 2 Ch. R. 8.

or marriage, the term may be secured for that purpose in the life-time of the father<sup>b</sup>. So if the term after the life of the father be upon trust, that if the father die without issue male by his wife, having daughters, and the wife dies without a son, the term may be sold in the life-time of the father for the portions of daughters, when they attain such an age, or marry<sup>c</sup>.—If there be a term for raising portions for daughters, without saying at what age or time, they shall be raised with reasonable maintenance from the death of the father<sup>d</sup>.

If a term for years be granted to the use of a feme sole, and she takes husband and dies, the administrator of the wife shall have the use, and not the husband<sup>e</sup>.

If lands are devised to a feme sole, and her heirs, upon the day of marriage : this is a devise of a future estate upon a contingency ; and until that contingency happens, there is no devisee to the estate : the fee simple is not disposed of ; it therefore descends to the heir at law. This is a freehold commencing *in futuro*, which limitation would be void in a deed, but is permitted to be a good devise by will. And such an executory devise cannot be barred by a recovery suffered before it commences, because it is not a present interest<sup>f</sup>.

### *Of Bonds and Obligations executed to Women.*

**A** Bond was made to a woman *dum sola*, to pay her so much yearly as long as she and the obligator should live together ; afterwards the woman married, and action of debt being brought on the bond by husband and wife, the

<sup>b</sup> 2 Vern. 355.  
& Fem. 269.

<sup>c</sup> 2 Vern. 657.  
<sup>f</sup> Sid. 153. Cro. Ja. 593.

<sup>d</sup> 2 Vern. 460.

<sup>e</sup> Bar,

defendant pleaded, that he and the plaintiff's wife did not live together. But it was adjudged that the money should be paid during their joint lives ; so long as they were both living at the same time <sup>s</sup>.

A, by bill of sale made over his goods to a trustee for B, who lived with him as his wife, and was so reputed ; and he also purchased a lease of the house wherein he dwelt, in the name of a trustee, and declared the trust thereof to himself for life ; then in trust to B during the residue of the term ; and this bill of sale was held fraudulent as to creditors, but as to the declaration of the trust of the term, the court held it good, and not liable to A's debts, the term being never in him ; and being so settled at the time it was purchased, and A might have given the money to B, who might have purchased it for herself, and in her own name <sup>b</sup>.

A man having a wife who lived separate from him, afterwards married another woman, who knew nothing of the former wife's being alive ; but it being discovered to the second wife that the former was alive, the husband, in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee of the second wife, to leave her a thousand pounds at his death, and died, not leaving assets to pay his simple contract debts. By the court : If this bond had been given immediately on the discovery, and they had parted thereupon, it had been good ; but being given in trust for the second wife, after such time as she knew the first was living, and to induce her to continue with the husband, this was worse than a voluntary bond. And decreed to be postponed by all the simple contract debts. But if such bond had been given to the second wife as a re-

<sup>s</sup> 3 Lutw. 555.

<sup>b</sup> 2 Vern. 490.

compence for the injury done her, and thereupon she had left the husband, it had been a good bond, and to be paid before any simple contract debts <sup>1</sup>.—On a special case reserved at Nisi Prius, at the assizes at Abingdon, the declaration stated, that William May, in consideration that Sarah Fenton, the plaintiff, would be and become his housekeeper and servant, and take upon herself the management of his family, &c. and perform the same as long as it should be mutually agreeable, May undertook and promised to pay her wages at the rate of 6l. a year, and also by his last will and testament, to give and bequeath to her a legacy or annuity of 16l. by the year, to be paid to her yearly from the day of his decease, during the term of her natural life: and she confiding in the said promise, entered into his service, and became his housekeeper, &c. and continued so for three years and fifty-nine days; but that he had not performed such agreements, and did not leave her the promised legacy or annuity. It appeared, that there was such an agreement between the parties, but that it was by parole and not in writing, a verdict was found for the plaintiff for 220l. subject to the opinion of the court of King's Bench on the following questions, viz. whether the evidence was sufficient to maintain the action; and whether the agreement therein set forth, ought not to have been in writing? And the court unanimously agreed that the judgment should stand <sup>2</sup>.—Sarah Walker brought an action upon bond from William Perkins, who died intestate, in a penalty. The bond recites, that whereas the above bound William Perkins, the intestate, and Sarah Walker, had agreed to live together, therefore he had agreed to find her meat, drink, washing and lodging, &c. and to leave her an annuity of 60l. a year

<sup>1</sup> 3 P. W. 339.

<sup>2</sup> Fenton against Emblems, executor of May,

H. 2 Geo. III. 3 Bar. Mansf. 1278.

if he quitted her, or she out-lived him ; and if they had any child, he was to take care and provide for it ; *but if she should leave him*, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity. The defendant administrator to Perkins pleaded, that this was an agreement between the plaintiff and the intestate, to live together in a state of fornication ; and that such a bond, made in pursuance and support of such an agreement, is void by law. In reply to which the plaintiff alledged, that she was a virgin, and was seduced by the intestate ; and in consideration thereof, this bond was given to her by him : That it was *præmium pudicitiae*, and Mr. Blackstone observed, that the condition consists of two parts, one to live in a state of debauchery, the other to leave her an annuity. The former part whereof is void, the latter good. The suit may therefore well be upon the virtuous part ; the paying her the annuity ; for it is agreed, that the common law having made that void which is against law, lets the rest stand, and that where a bond is conditioned to do something agreeable to common law, and others disagreeable to it, the breach may be assigned upon that part which is good ; and here *præmium pudicitiae* is a sufficient consideration.—By Lord Mansfield. It is the price of prostitution ; *præmium prostitutionis* : for if she became virtuous, she was to lose the annuity. It appears clearly upon the condition, that the bond is illegal and void. And judgment was given for the defendant <sup>1</sup>.

*What acts of a feme-sole are annulled by an after Marriage.*

**I**F a feme-sole makes a will, and afterwards marries, such subsequent marriage is esteemed a revocation of the will, and entirely vacates it <sup>m</sup>.

<sup>1</sup> Walker against Perkins administrator, M. 5 Geo. III. 3 Bur. Mansf. 1568.

<sup>m</sup> 4 Rep. 60. & P. W. 624.

If a feme-sole is plaintiff in a suit, and marries whilst it is depending, the suit will abate. And so in the court of Chancery, if she marries pending a bill, this her own act will abate the suit, and she and her husband must join in a bill of revivor, but the suit goes on if she is defendant". —A warrant of attorney had been entered into to confess a judgment to a woman-plaintiff *dum sola*, and she afterwards married the man-plaintiff in the action : after which marriage the judgment was entered up by the husband and wife. The warrant of attorney to confess the judgment bore date in December 1762 ; the plaintiffs intermarried February 1763 ; the judgment was entered up in the May following. Soon after the execution was taken out and served, and the money levied remained in the hands of the sheriff. The question was, whether this judgment thus entered up by the husband and wife be regular or not ? The court declared their opinion to be, that the judgment was irregular for want of a previous leave of the court to enter it up. They held, that in order to warrant this entry of the judgment, there ought to have been an application to the court for leave to enter it up thus : founded upon a proper affidavit proving the marriage between the plaintiffs ; upon which a rule of court should have been obtained, giving leave to enter up judgment accordingly ; but as this previous step was not taken, the judgment was irregular for want of it. In consequence of which the rule was made absolute. But they did not think it reasonable for the plaintiffs to pay costs \*.

If A on the one part, and B and C on the other part, subject themselves to arbitration ; the latter, C, being feme-sole, marries, after which the arbitrator, before any notice of

\* Bar. & Fcm. 313.  
3 Burr. Mansf. 1469.

o Marder and his wife against Lee, E. 4. G. III.

the marriage, awards that B and C shall pay 30l. to A ; this award shall not bind the parties. The submission made by C to arbitration is revoked by her marriage ; and B is not compellable to abide by an award from which his partner in the suit is exempt <sup>p</sup>.—The plaintiff Jones declared against Judith Parnell upon several promises. She by the name of Judith King appeared by attorney, and pleaded *non assumpsit*. And after a verdict for the plaintiff, she and Edward King brought a writ of error ; and assign for error, that she had appeared and pleaded as a feme-sole, whereas at the time of her appearance and plea she was married to the said Edward King. But the court were of opinion, that the plaintiff's writ should not abate by the act of the defendant ; which was never allowed. It must be taken, that at the time of bringing the action the defendant was a feme-sole, because they pretend to carry it no further back than the appearance. And the court observed that plaintiffs would be in a fine condition, if after they have arrested a woman she should be allowed to overthrow their proceedings by a subsequent marriage. The judgment was therefore affirmed <sup>q</sup>.—If a feme-sole bring an action of trespass and recover ; and a writ of enquiry of damages is awarded, and before the return of it she marries ; after which the writ is returned, and judgment given upon it, without any exception then taken by the defendant ; he shall not afterwards have advantage of this in a writ of error, because the writ was only abatable by plea <sup>r</sup>.

*Cases determined relating to single Women.*

**M**ARY MORISSET had lent Daniel King 100l. to be repaid to her at the end of four years without interest : but in consideration that the said Daniel should find and provide

<sup>p</sup> Case of White & Giffard, 1 Roll's Ab. 331. 3 Keb. 9.      <sup>q</sup> King & his wife against Jones, T. 2. G. II. Stran, 811.      <sup>r</sup> 1 Roll's Abr. 781.



for Mary Dubois, daughter of Mary Morisset, meat and drink in the house where he dwelt, or should dwell, for four years, if the said Mary Dubois should so long live; and that she should, during the said term, be co-partner with Mary King his wife, in the business of a milliner, and should all that time bear one moiety of the losses, charges, (except housekeeping) shop-rent, and materials necessary for carrying on the trade, which Daniel King agreed to provide. And that each should do their utmost as partners, to carry on the trade, and should equally divide the profits; and further, that Daniel King should lodge the said Mary Morisset, (the mother) she paying him 10*l.* a year; and at the end of the four years Daniel King was to repay the 10*0l.* and in case of the death of Mary Dubois, to pay the principal with lawful interest to Mary Morisset.—To this was pleaded that it was a corrupt agreement; the board of Mary Morisset, the mother, being worth 20*l.* a year, and the board of the daughter was worth 10*l.* a year, and the question was whether this was an usurious contract within the statute that makes void all bonds, contracts, and assurances, where more than five per cent. per annum is directly or indirectly taken for any loan<sup>s</sup>. And the court were clearly of opinion, that this case could not be within the statute of usury. Lord Mansfield observed, that it is impossible to say that King might not have received so much advantage by this partnership as to be worth the consideration. It might be a very advantageous bargain to King: here might be recommendation, skill, labour, or other benefits arising to him from it. The plaintiff's daughter might have been drawn into a bankruptcy by means of this agreement, which would have been more severe to her perhaps than the penalty of this statute of usury would be.—On a motion by Mr. Norton, who moved on

<sup>s</sup> 12 Ann, Stat. 2. c. 16.  
Mansf. 891.

<sup>t</sup> Morisset against King, 33 Geo. II. 2. Burr

behalf of the relations and friends of one Mrs. Frances Savage, a woman addicted to and almost destroyed by liquor, representing that she was in the hands of very improper persons, who were suspected to be using artifices with her in order to the obtaining a will from her when she was under very improper circumstances of mind to make one : and was too much under their influence even if her understanding and memory had been more perfect, and less disordered by intemperate drinking. A rule was made upon the defendants to shew cause why an information should not be exhibited against them for the misdemeanor charged in the affidavits. And it was added in the rule that certain of the woman's friends therein particularized, should at all proper times and seasonable hours respectively be admitted, and have free access to her, to consult with, advise, and assist her.—Note, she was too infirm and weak to be brought into court by an *habeas corpus* <sup>u</sup>,

## C H A P. IV,

### *Of the Disposal of Property before Marriage.*

**A** M A N made a present of a jewel to a lady whom he courted ; but the marriage not taking effect, he brought an action of detinue against her to recover the jewel ; and she taking it for a gift offered to wager her law. But the court was of opinion, that the property was not changed by this gift, being to a special intent, and therefore would not permit her to do it <sup>v</sup>.

<sup>u</sup> King against P. Wright, R. Voss, and others, M. 1. Geo. III. 2 Bur. Mansf. 1099.      <sup>v</sup> 2 Mod. R. 141.

Bond being given before marriage by the husband, that the wife should dispose of 500*l. ad libitum*; which bond she afterwards, when married, consented to cancel, upon the husband's giving a note in writing, that she should dispose of the said sum; only that he should be first acquainted with it; which the husband laboured to avoid on pretence of not being acquainted with it. But the right of the wife was decreed against the husband <sup>w</sup>.

If the husband and wife by deed, agree before marriage, that the wife shall have power to dispose of her estate as she pleases during the coverture; and the deed is put into the hands of an agent, who during the coverture pays the rents and profits to the husband with the wife's approbation; that agent shall not be answerable on the death of the husband for what he had so paid; for the agreement being between the husband and wife only, is determined by the marriage <sup>x</sup>.

A man entering into articles with his intended wife to settle certain lands on her, but the marriage taking effect before any settlement is made, the heir of the husband shall execute the agreement <sup>y</sup>.

A man entering into a bond conditioned to leave his intended wife 1000*l.* the marriage is had, the husband mortgages his estate and dies; the bond, though void in law, being extinguished by the marriage, is good in equity! Decreed that the wife may redeem and hold the land till she is satisfied her debts <sup>z</sup>.

An uncle gave his niece 1200*l.* the niece married, but antecedent to the marriage, the father took a bond from the

<sup>w</sup> 1 Rep. in Ch. 118.

<sup>y</sup> 30 Car. II. 3 Vint. 343.

<sup>x</sup> E. 15 Cha. II. 1 Ch. Ca. 21.

<sup>z</sup> H. 4 Ana, 2 Vent. 480.

intended husband, to pay him 200l. in case the daughter should happen to die without issue male, leaving her husband; the daughter did die without issue male; and her husband survived. The father thereupon sued the husband at law upon this bond: The husband brought his bill in equity to be relieved against this bond, and had a decree accordingly; for it appearing that no money was paid, nor consideration for entering into it, the court took it to be in nature of a marriage-brokage bond; and thereupon ordered it to be delivered up <sup>a</sup>.

A guardian, at the request of one who was going to marry his ward, gave in an account of the estate to the intended husband, and secured to him the balance by three several bonds: and the intended husband gave a bond to the guardian, to release all accounts to him after the marriage. The marriage was had: the guardian paid the balance: but the husband gave no release, but sued for an account, and relief against the bond. And the guardian was ordered to answer the bill: for the account was made when the intended husband had no title; no release is given; and the pursuit is fresh <sup>b</sup>. And by lord ch. j. Cowper: Wherever a father, mother, or guardian, insists upon private gain, or security for it, and obtains it of the intended husband, it shall be set aside <sup>c</sup>. For marriage-brokage agreements have been often condemned in equity. And a bond to give money if such a marriage could be obtained is ill. And so is a bond to forgive a sum of money. For such bonds, although good at law, yet being introductive of infinite mischief, have upon great consideration been condemned in equity <sup>d</sup>.—The defendant on a treaty of marriage for his daughter with the plaintiff signed a writing, comprizing the terms of an

<sup>a</sup> Ab. Eq. 90.  
Ca. 157.

<sup>b</sup> Case of Osborn and Chapman, M. 35. Car. II. 2 Ch.

<sup>c</sup> 1 Salk. 158. 2 Vern. 652.

<sup>d</sup> 3 P. W. 394.

agreement ; and afterwards designing to elude the force thereof, and get loose from it, ordered his daughter to inveigle the plaintiff out of the writing, and then marry him, which she accordingly did : the husband was relieved on the point of fraud, and the father compelled to abide by his agreement<sup>e</sup>.

If an estate for life is limited to A upon his marriage with B, the marriage is a precedent condition expressed in the grant itself, and till that happens no estate is vested in A<sup>f</sup>.— If lands are granted to a man conditioned to take the donor to his wife within a certain time ; if he does not espouse her, or takes another woman to wife, or any other way disables himself from taking her agreeable to the original condition between them, then the donor shall have a writ of entry on the lands *causa matrimonii prælocuti* against him, or whoever else is in the lands.

If a father in consideration of a clerk's marrying his daughter doth covenant with the clerk's father, that he will procure the clerk to be presented, admitted, instituted, and inducted into such a church upon the next avoidance thereof, such is a simoniacal contract<sup>g</sup>.

If a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail ; here till he marries, the use results back to himself ; after marriage it is executed in the wife for life, and if she dies without issue, the whole results back to himself in fee. If A makes a feoffment to the use of his intended wife, and her eldest son for their lives : upon the marriage, the wife takes the whole use in severalty ; and upon the birth of a

<sup>e</sup> Ab. Eq. Ca. 20. 2 Vern. 373.

<sup>f</sup> Watf. c. 5.

<sup>g</sup> Show. Parl. Cas. 83.

Yon, the use is executed jointly in them both ; this is called a secondary, and sometimes a shifting use ; for whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a resulting use<sup>b</sup>.—If a feoffment is made to A in fee simple, on condition that he marries with B by such a day ; within which time the woman dies, or the feoffor marries her himself, then the estate shall be vacated and determined : the condition is void, and the estate made absolute in the feoffee ; for he had by the grant the estate vested in him, which shall not be defeated afterwards by an impossible condition<sup>c</sup>.—Where a feoffment is made to the use of a man and such wife as he shall afterwards marry, for term of their lives, and he afterwards marries, in this case it seems to have been held that the husband and wife had a joint estate, though vested at different times, because the use of the wife's estate was in abeyance, and dormant till the intermarriage, and being then awakened, had relation back, and took effect from the original time of creation<sup>k</sup>.—If lands are given to a man, and such a woman as shall be his wife, the man takes the whole. But if a man makes a feoffment in fee to the use of himself, and the wife that shall be ; and afterwards he takes a wife, his wife shall take jointly with him, although all at first vests in the husband<sup>l</sup>.—See of jointures in Chap. VIII.

### *Actions on Marriage Contracts.*

**A**NY verbal agreement made upon consideration of marriage, is not sufficient to ground an action upon, but some note or memorandum of it, must at least be made in

<sup>b</sup> Bacon of uses, 350, 351.

<sup>c</sup> 1 Rep. 101.

<sup>l</sup> 1 Co. Litt. 206.

<sup>k</sup> 1 Co. 101.

<sup>m</sup> Dyer, 340.

writing, and signed by the party to be charged therewith <sup>m</sup>.  
 —A woman brought an action against a man, setting forth in her declaration, that in consideration she promised to marry the defendant, he promised to marry her on his father's death ; who is since dead ; but the defendant refused so to do ; and has since married another woman, which she laid at a thousand pounds. And a verdict was given her for 300l <sup>n</sup>.—An action of covenant was brought upon a marriage contract ; being a promise under the defendant's hand and seal, and in his hand writing to the following effect :  
 “ I do hereby promise Mrs. Catharine Lowe, that I will not marry with any person besides herself ; if I do, I agree to pay the said Catharine Lowe 1000l. within three months next after I shall marry any one else, witness my hand Newshaw Peers, and seal, &c.” Which deed was executed in 1757 ; and in 1767, Peers married another woman, whereupon this action was brought. The plaintiff averred in her declaration, that she had remained single, and was always willing and ready to marry him, while he continued single ; but that he married Elizabeth Gardener. The cause was tried before lord Mansfield at Guildhall. It appeared in evidence by letters that were read, that there had been a long courtship, and that this obligation was fairly and voluntarily given by the defendant to the plaintiff. He pulled the stamp paper out of his pocket, and wrote, signed, sealed and executed it, in the presence of one witness. And a witness who saw it executed, attested it after the defendant was gone. There was no intercourse between the plaintiff and defendant afterwards. The sealing by the defendant was contested, but the witness to the deed swore, that the defendant sealed it before he wrote his name ; and the impression of the seal on the bond was found to be the same with that

<sup>m</sup> 29 Car. II. c. 3.<sup>n</sup> Stat. 34.

on the letters which the defendant had written to the plaintiff<sup>o</sup>. His lordship therefore directed the jury to find for the plaintiff with 1000*l.* damages, if they thought the deed to be a good one. If this direction was wrong, he gave the defendant leave to move for a new trial without costs.—Accordingly Mr. Dunning (solicitor general) moved the court of King's Bench for a new trial, with liberty afterwards to move in arrest of judgment.—The question proposed to be debated was, whether the jury could give any more or less damages than the 1000*l.* the specific sum mentioned in the deed? As well as, whether this instrument is good enough in law to support any action whatsoever? It was agreed, that both motions (*viz.* for a new trial, and in arrest of judgment) should come on to be argued together. The opinions of lord Mansfield and the rest of the judges, were to the following effect. The defendant, in his declaration, pleads *non est factum*. But it was proved to the satisfaction of the jury, that it was his deed, therefore they gave 1000*l.* damages; and by law and justice he ought to pay the 1000*l.* money in the measure of value, therefore what else could the jury find but this 1000*l.* unless they had also given interest after the three months. The money was payable on a contingency, and the contingency has happened: therefore it ought to be paid. Where the precise sum is not the essential of the agreement, the quantum of the damages may be assessed by the jury; but where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damages, and the jury are confined to it. Which brings the matter to the validity of the deed. It is objected,

<sup>o</sup> This latter circumstance is not reported; but the writer, who was in court, gives it from his own recollection of the trial. He likewise thinks, that the letters which were produced in court, by lord Mansfield's direction, were not read, as the council for the defendant did not controvert the previous courtship.—These trivial circumstances are mentioned, not to lessen the merit of a most accurate and judicious reporter, but merely for the sake of precision.



that all engagements in restraint of marriage are void ; this engagement is of that sort. That there is besides no consideration for this contract ; it is not reciprocal, here is no mutuality ; which is essential to the validity of a contract. It is answered, that this construction is directly contrary to the words and intention of the deed, which amounts to a mutual agreement between those two persons, to marry each other ; which is proved by the plaintiff's acceptance of the deed ; and that what the jury have found is a sufficient reason to have it supposed, that there was such a mutual agreement to marry each other. But however this is, there is at the utmost only a contract, that he would not marry any other woman ; and that if he should marry any other woman, he would pay the plaintiff 1000*l.* within three months after he should so marry ; but it is very far from restraining his marrying at all.—This is a point of very considerable importance.—All such contracts ought to be looked upon (as lord Hardwicke said in the case of *Woodhouse, v. Shepley*) with a jealous eye ; even supposing them clear of any direct fraud. In that case lord Hardwicke did not proceed on any circumstances of particular actual fraud, but on public and general considerations, and therefore he gave no costs. These engagements are liable to many mischiefs, to many dangerous consequences. When persons of different sexes, attached to each other, and thus contracting to intermarry, do not marry immediately, there is always some reason or other against it ; as, disapprobation of friends and relations ; inequality of circumstances, or the like ; both sides ought to continue free, otherwise such contracts may be greatly abused ; as, by putting women's virtue in danger by too much confidence in men ; or by young men living with women without being married ; therefore these contracts are not to be extended by implication. But here is not the least ground to say, that this man has engaged to  
marry

marry this woman ; much less does any thing appear of her engaging to marry him. It is a covenant not to marry any one but the plaintiff ; and yet she was under no obligation to marry him ; so that it restrained him from marrying at all, in case she had not chosen to have permitted him to marry her. There is a great difference between promising to marry a particular person, and promising not to marry any one else. There is no colour for either of those constructions that have been offered by the plaintiff's council. The motion for arrest of judgment would not have been proper if this was a covenant to marry her ; but it is only not to marry another. The words are plain and manifest, and the intention seems to have been agreeable to them. The deed was executed in 1757, and the defendant did not marry till 1767. The plaintiff she lay by, and never made a request to him to marry her ; but when he married another, she brought her action of covenant, but no intercourse subsisted between them during that long interval. It seems to have been understood by the parties themselves, and even by the plaintiff herself, in the same sense as this court understands it now. Another reason why we should not strain in favour of this contract is, because if there was really any mutual contract under fair and equal circumstances, the plaintiff will still be at liberty to bring her action ; for a void bond can never stand in her way. Therefore we think, that what passed at the trial was perfectly right ; that the measure of damages was a thousand pounds, and that this was such a contract as ought not to be carried into execution. The rule for a new trial was discharged, and the judgment arrested <sup>p</sup>.

<sup>p</sup> Catharine Lowe against Newham Peers, E. 8 Geo. III. 4 Bur. Manf. 2225.

*Decisions of the Courts on Restrictions laid on the Liberty of Marriage, by last Wills and otherwise.*

Generally, by the ecclesiastical law, all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hindrance to the propagation of the species. Therefore if a legacy is given conditioned, that the legatee marry according to the appointment, arbitrament, or consent of some other person, this condition is rejected as unlawful<sup>9</sup>. But if the legacy is so conditioned that marriage is only restrained in respect of time, place, or person, then such conditions are not absolutely to be rejected. Such for instance as, not to marry before the age of twenty years : but if the restriction is extended to an unreasonable length of time it may be avoided ; but restrictions, not to marry a particular person, or a widow, or a woman from any particular place, or the like, are good<sup>r</sup>. In the temporal courts the distinction seems generally to have been, where the legacy is devised over to another, and where it is not devised over. In the former case it hath been held that the restraint shall be good, so as the legacy shall not be due unless the condition be performed ; but in the latter case where there is no devise over, it hath been held that the proviso or condition is only *in terrorem*, to make the person careful, but not to defeat the legacy<sup>s</sup>.—In the case of Pulling and Reddy, lord ch. Hardwicke delivered his decision, that if a woman has a legacy conditioned, that she marry with the consent of a third person, and there is no devise over in case she marries without such consent ; this is only to be considered *in terrorem*. But if

<sup>9</sup> Godol. O. L. 45.

<sup>r</sup> Ib.

<sup>s</sup> 1 Chan. Ca. 22. 1 Vern. 20.

there is a devise over, and she marries in opposition to the direction of the will, the legacy shall go to the person to whom it is so devised over. And his lordship said, “this rule is taken from the civil law, as this court hath a concurrent jurisdiction as to legacies. But if a portion is to arise out of lands, and there is no devise over, in that case she shall not have it, but it shall go to the heir; for the spiritual court hath no jurisdiction as to lands.” There may be some doubt, (he said) where money is given to be laid out in lands.—Robert Ballyman being seised in a fee simple, duly made his will, and thereby devised his farm called Parke, &c. upon trust, to two trustees named, for his son Robert Ballyman for life, and to such woman as should be his wife at the time of his death, in jointure. And after her death then to the children of his said son, and their respective heirs, according to the priority of such children’s birth. And on failure of his issue then to the testator’s two daughters. Subject, however, to the following proviso: “Provided always, and it is my very will and true intent, and express meaning, that in case my son Robert shall marry with any woman not having a competent marriage portion, or without the consent and approbation of the said trustees, their heirs and assigns in writing, under their hands and seals, to be executed in the presence of two or more credible witnesses first had and obtained, that then my said trustees, their heirs, &c. immediately after the decease of my said son Robert, shall stand and be seised of the said farm called Parke, for the use of my two daughters, Hannah and Elizabeth, and their heirs forever; notwithstanding the former devise thereof to my son Robert’s wife, and their issue. And this proviso is not intended to be construed or taken *in terrorem*, but a condition, for want of performance

Whereof, in every respect, the said lands called Parke shall in no case be vested in such wife, or the heirs of such marriage, but that the trustees shall be seised of the same for the use of my two daughters." The testator Robert Ballyman the elder died seised in 1730. His son married Mary Stephens in 1739. In 1765 he died leaving the said Mary his widow, and one daughter, who married Dennis, the defendant in this cause. Hannah Ballyman, the daughter of the testator, died in 1751. Elizabeth, the other daughter, married in 1732 Richard Clarke, one of the trustees named in the will. The two trustees were both living at the time of the marriage of Robert Ballyman with Mary Stephens. The daughter of Elizabeth Clarke, and her husband Hurley in her right, as heir at law of her mother Elizabeth deceased, claimed title to the said farm on the death of Robert the son, under the proviso of the will. Alledging that Mary Stephens was a woman of no circumstances, and had not a competent marriage portion at the time of her marriage, and that they were married without the consent of the trustees first had, according to the express direction of the will. The cause came on to be tried at the assizes for Devon, when the jury found, that the said Mary Stephens at the time of her marriage with R. B. had a competent marriage portion, but that he married her without any consent or approbation of the trustees named in the will, and therefore found a verdict for the plaintiff, subject to an opinion of the court of King's Bench, upon the following question, viz. Whether the plaintiff had a right to recover the said premises? After hearing council on both sides, lord Mansfield delivered the sense of the court as follows. Conditions in restraint of marriage are odious, and are therefore held to the utmost rigour and strictness. They are contrary to sound policy. By the Roman law they are all void. In the present case the forfeiture is so cruel as to begin with the innocent issue

of the offender, whilst he himself is to have it at all events for his own life. This testator considered money as the only qualification of a wife; but he still means to leave it to the judgment of the trustees, whether there might not be some equivalent for money; he only meant to require their sanction in case his son married a woman without a competent fortune. Here is no objection to the marriage; and one of the trustees is become one of the devisees over, therefore a cause of objection ought to be shewn, otherwise it should be considered as if his consent was withholden without reason<sup>u</sup>.

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## C H A P. V.

### *Property conveyed or altered by Marriage.*

**B**Y marriage the husband and wife become one person in law; and therefore such an union works an extinction or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife; who if she was allowed at her pleasure to rescind and break through, or confirm several acts, she might be so far influenced by her husband as to do things greatly to her own disadvantage. But in things which would be manifestly to the prejudice of both husband and wife, the law doth not make her acts void: and therefore if a feme-sole makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will so as to make the lease void, but she herself cannot de-

<sup>u</sup> Long against Dennis, E. 2. Geo. 7. 4 Bur. Mans. 2053.

termine the lease in either case, without the consent of the husband<sup>v</sup>. By marriage those chattels which belonged to the woman before marriage, are by act of law vested in the husband, with the same degree of property, and with the same powers as the wife when *sole* had over them: and this is founded on the notion of an unity of person subsisting between the husband and wife; it being held in law that they are one person, so that the very being and essence of the woman is suspended during the coverture, or entirely merged and incorporated in that of the husband. And hence it follows, that whatever personal property belongs to the wife before marriage is thereby absolutely vested in the husband. In a real estate he only gains a title to the rents and profits during coverture: for that depending upon feudal principles, remains entire to the wife after the death of her husband; or to her heirs, if she dies before him, unless by the birth of a child he becomes tenant for life by the courtesy. But in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for unless he reduces them to possession, by exercising some acts of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representative after the coverture is determined. There is therefore a very considerable difference in the acquisition of this species of property by the husband, according to the subject-matter, viz. whether it be a chattel real, or a chattel personal; and of chattels personal, whether it be in possession or in action personal. A chattel real vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it, during the coverture<sup>w</sup>: if he

<sup>v</sup> Cro. Car. 304. Co. Lit. 55.

<sup>w</sup> Co. Lit. 46.

be outlawed or attainted, it shall be forfeited to the king <sup>x</sup> : it is liable to execution for his debts <sup>y</sup> : and if he survives his wife it is to all intents and purposes his own. Yet if he has made no disposition thereof in his life-time, and dies before his wife, he cannot dispose of it by will <sup>z</sup> : for the husband having made no alteration in the property during his life, it never was transferred from the wife ; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal, (or choses in action) as debts upon bond, contracts, and the like. These the husband may have if he pleases ; that is, if he reduces them into possession by receiving or recovering them at law. And upon such receipt or recovery they are absolutely and entirely his own ; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not vest in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they still continue things in action, they shall survive to the wife ; for the husband never exerted the power he had of obtaining an exclusive property in them. And so if an estray comes into his wife's franchise, and the husband seizes it, it is absolutely his property ; but if he dies without seizing it, his executors are not now at liberty to seize it, but the wife, or her heirs, for the husband never exerted the right he had, which right determined with the coverture. Thus in both these species of property, the law is the same, in case the wife survives the husband ; but in case the husband survives the wife, the law is very different with respect to chattels real and choses in action ; for he shall have the chattel real by survivorship, but not the things in action <sup>a</sup>, except in the case of arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband, by

<sup>x</sup> Plowd. 283.<sup>y</sup> Co. Lit. 351.<sup>z</sup> Poph. 5.<sup>a</sup> 3 Mod. 186.



statute 32 Hen. VIII. c. 37. And the reason for the general law is this : that the husband is in absolute possession of the chattel real during the coverture, by a kind of joint-tenancy with his wife ; wherefore the law will not wrest it out of his hands, and give it to her representatives : though in case he had died first, it would have survived to the wife, unless he thought proper in his life time to alter the possession. But a thing in action shall not survive to him, because he never was in possession of it at all during the coverture ; and the only method he had to gain possession of it, was by suing in his wife's right : but as after her death he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never as such recover the possession. But he still will be entitled to be her administrator ; and may in that capacity recover such things in action, as became due to her before or during the coverture. Thus, and upon these reasons, stands the law between husband and wife with regard to chattels real, and choses in action : but as to chattels personal or choses in possession, which the wife hath in her own right, as ready money, jewels, household goods, and the like ; the husband hath therein an immediate and absolute property devolving to him by the marriage, not only potentially, but in fact, which never can again revert in the wife or her representative <sup>b</sup>. And as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods, which shall remain to her after his death, and shall not go to his executors. These are called her paraphernalia, of which more will be said hereafter : this is a term borrowed from the civil law <sup>c</sup>, and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and

<sup>b</sup> Cro. Car. 343.

<sup>c</sup> 1 Roll. Abr. 211.

ornaments of the wife, suitable to her rank and degree, which she becomes entitled to on the death of her husband, over and above her jointure or dower; and preferably to all other representatives<sup>d</sup>; and the jewels of a peeress, usually worn by her, have been held to be paraphernalia<sup>e</sup>. Neither can the husband devise by his will such ornaments and jewels of his wife, though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them, or give them away<sup>f</sup>. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors, where there is a deficiency of assets<sup>g</sup>. And her necessary apparel is protected even against the claim of creditors<sup>h</sup>.

The husband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and as the receipt of the rents and profits of her real estate during coverture, also whatever accrues to her by her labour or otherwise during coverture, belongs to the husband; so in favour of creditors; and that no person's act shall prejudice another, the law makes the husband liable to those debts with which he took her attached. But if a feme-sole indebted, marries, and dies; the husband shall not be charged; for they must be recovered in the life of the wife. If husband and wife are sued on the wife's bond entered into by the wife before marriage; and judgment is had thereupon, and the wife dies before execution; yet the husband is liable; for the judgment has altered the debt. If the husband is abroad, beyond sea, and the wife buys neces-

<sup>d</sup> 2 Leon. 166.<sup>e</sup> Moor 218.<sup>f</sup> Noy's Max. c. 49.<sup>g</sup> 1 P. W. 730.<sup>h</sup> Blackst. b. II. c. 29.

saries during his absence, this is a good evidence for a jury to suppose the consent of the husband <sup>l</sup>.

Debt against husband for the lodging of his wife, and proof only made that he formerly cohabited with her, and owned her as his wife; this was held sufficient to charge him. But the husband may discharge himself if he can give elopements in evidence <sup>k</sup>,

If a feme-covert is found guilty of a battery, and fined, such fine shall not be levied upon the husband. But after the husband's death, damages or a fine shall then be levied of the wife herself; and as for imprisonment, or other corporal pain, it shall be inflicted on the wife only, and not upon the husband for his wife's act, or default <sup>l</sup>.

The husband is by law answerable for all actions for which his wife stood attached at the time of the coverture; and also for all torts or trespasses during coverture; in which case the action must be joined against them both; for if she alone is sued, it might be the means of making the husband's property liable, without giving him an opportunity to defend himself <sup>m</sup>. If a man and his wife exhibit their bill of complaint, and the defendant puts in an answer, and the man dies, the woman shall be at her election whether she will exhibit a new bill, or proceed upon the former, and the defendant shall be bound by the answer made to the man and his wife <sup>n</sup>. If a man exhibit a bill against an husband and wife for a matter wholly concerning the wife, and both answer; and after the husband dies, this will abate the suit, and the plaintiff cannot proceed against the wife without

<sup>l</sup> F, N, B. 265. 3 Mod. 186. 10 Hen. VI. c. 10. 12.—c. 20 & 22. 1 Sid. 327, 337.

<sup>k</sup> 12 Mod. 372.

<sup>l</sup> 11 Mod. 253. Dalt. c. 139.

<sup>m</sup> 2 Hen. VI. c. 4, Co, Lit. 133.

<sup>n</sup> Bar. & Fem. 313.

revivor : for the wife shall not be constrained to abide by that answer which she made with her husband, because she was then under the power and coercion of her husband, and he being dead, and she seised of the thing in question as her former estate, she ought to make a new answer ; but if she chooses to abide by the answer made with her husband, the plaintiff may proceed without revivor °.

A feme-covert lent 20l. to be paid at 20s. by the week, and one shilling and sixpence interest, which amounted to thirty shillings, which the wife exacted and received ; and this appearing in evidence in an action brought by the husband for the money. Holt ch. j. ruled it to be an usurious contract by the husband, sufficient to discharge and avoid the obligation in a civil action, though not sufficient to charge the husband in a criminal indictment p.

Husband and wife may be joint-tenants ; but herein it is to be observed, that they being considered as one person in law ; if an estate be made to husband and wife, and a third person, and their heirs ; the husband and wife take but one moiety, and the third person the other q.—So there can be no moieties between husband and wife, of an estate given to them jointly during coverture. Therefore if lands be given to husband and wife, and their heirs, the husband cannot during the wife's life dispose of any part of it, but the whole must go to the survivor of them r.—But if an estate be made to a man and a woman, and their heirs before marriage, and after they intermarry, the husband and wife have moieties between them s.

A woman before her marriage being possessed of a term for years as executrix to her first husband, and which was

° Bar. & Fem. 313.

p. Skin. 348.

q Litt. Sect, 291.

r Co. Litt. 187.

s Ibid.

liable as assets to the payment of his debts ; in order thereto, and to raise money for that purpose, after marrying a second husband, she, together with her husband, enter into an agreement with A for the sale of the house so held for years, for the residue of the term : for which A agreed to pay 450l. whereof 210l. was to be allowed in discharge of a mortgage, and the remaining 240l. to be paid to them. Whereupon they execute an assignment of the house to A, with a receipt endorsed thereon for the whole purchase-money ; but A did not then pay the whole purchase-money, but gave a note for the payment of 210l. to the mortgagee, and the remaining 240l. to the husband and wife ; when it afterwards appeared that the husband and wife had by articles before marriage agreed to settle the house in question for the benefit of themselves and their issue ; of which the purchaser A had no notice at the time of his purchase. The husband and wife admitted that there were such articles, but insisted that the house laying in Middlesex, those articles were never registered in the Middlesex office, and therefore void as against the purchaser A. But on an hearing before the master of the rolls it was decreed, that the two notes given for the purchase-money should be delivered up, on a re-assignment of the house, by reason of the fraud of the husband and his wife in concealing the articles, which decree was afterwards affirmed by the lord chancellor.

If a legacy be devised to a woman who takes a husband, and the husband empowers a person by his letter of attorney to receive such legacy, and he by virtue of such authority receives it, it therefore ceases to be a thing in action, and becomes a thing in possession, and the husband, or his executor, after the death of the wife, shall have action upon this receipt <sup>u</sup>.

<sup>u</sup> Ab. Eq. Ca. 357.

<sup>u</sup> Vern. 626.

An annuity granted to a feme-sole by indenture, she marrying, the husband may release the grantor from payment thereof during coverture, but on his death, the right thereto reverts to the wife <sup>v</sup>.

Such actions as affirm property, as replevin, detinue, &c. must be brought in the name of the husband only; but such actions as disaffirm property, as trespass, trover, &c. must be brought in the joint names of husband and wife, because they are founded in tort made before coverture <sup>w</sup>. But in all cases where the wife shall not have the thing when it is recovered, neither sole to herself, nor jointly with her husband, but the husband only shall have it, the action shall be brought in his name only, without the wife.—Action of trover by the husband for money, which the wife lost at cards, and judgment was for him, though she played in his absence; yet it is said, that the husband may have action for the money won by her <sup>x</sup>,

If any one takes away another man's wife, and cloaths her, afterwards the husband retakes her back, the garments shall cease to be the property of him who provided them, being now annexed to the person of the woman <sup>y</sup>.

If a lease is made by the father of A. in trust, for the advancement of his daughter, who marries with him, the husband may clearly dispose of this term without any remedy at common law being to be had <sup>z</sup>.

An husband possessed of a term of seventy years in right of his wife, may grant a lease of those lands for twenty years to commence after his death, which shall bind the wife, because the term being but a chattel, he had a power to dis-

<sup>v</sup> Moer. 523.  
Fem. 320.

<sup>w</sup> Sid. 172. Bar. & Fem. 319.  
<sup>y</sup> Moer, 214.

<sup>z</sup> 1 Bull. 118.

<sup>x</sup> Bar. &

pose of it wholly; but by his will he cannot devise any part of such term. The residue is likewise liable to the debts, or forfeited by the crimes of the husband; and it seems, that if the husband makes a lease of part of the wife's term, conditioned to render rent, and dies, his executors, and not his wife, shall have the rent although she had the reversion <sup>a</sup>.

A man seised of lands in right of his wife, if the wife is attainted of felony, the lord shall enter and oust the husband. He gains nothing but a bare reception of profits till issue had; after issue he has estate for life <sup>b</sup>.

An husband seised of an estate *jure uxoris*, cannot make a firm and valid lease for any longer term than the joint lives of himself and his wife; for then his interest expires; but he may let leases to endure so long as his interest remains <sup>c</sup>. But an husband seised in right of his wife in fee simple, or fee tail, provided the wife joins in such lease, may bind her and her heirs thereby <sup>d</sup>.

If a husband makes a lease for years of the wife's land, and dies before the expiration of such lease, it is not determined nor void by his death, but voidable by the entry of his wife <sup>e</sup>. If husband and wife make a lease by indenture for term of years rendering rent, the lessee enters; the husband before the day of payment of the rent dies, the wife takes another husband before the day of payment, who accepts the rent at the day, and dies; the wife may not oust the lessee; she might have avoided the term before the day of payment at her pleasure, if she had not assigned away that liberty by her second marriage <sup>f</sup>.

<sup>a</sup> Cro. Car. 344.

<sup>b</sup> Bro. tit Charge. 111.

<sup>c</sup> 1 Roll's Ab. 851.

<sup>d</sup> Mod. 91. Blackst. b. II, c. 20.

<sup>e</sup> Cro. Ja. 53.

<sup>f</sup> Cro. Ja. 332.

By the doctrine of remainders and reversions, if he who hath the reversion of an estate in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife<sup>5</sup>.—According to the law phrase, whenever a greater estate and a less coincide, and meet in one and the same person, without any intermediate estate; the less is said to be merged, that is sunk, or drowned in the greater.

A feme-sole seised of a manor wherein there are copyholds marrying one of the copyholders, that copyhold is suspended by the marriage<sup>h</sup>.

If an husband seised in right of his wife of a manor to which an advowson is appendant, aliens the manor by acres to diverse persons, saving one acre, the advowson shall be appendant to that acre; but if one or two acres of the manor be granted together with the advowson, the advowson is appendant to such land, especially after the grantee hath presented<sup>i</sup>. Or if a lessee for life of a manor to which an advowson belongs aliens one acre with the advowson appendant, it is separated from the manor along with that single acre<sup>k</sup>.

If a man marries a woman possessed of an advowson, or the part of one, to her and her heirs, he may not only present jointly with his wife during the coverture, but if the church being void, the wife dies, having no issue, he shall present to the void turn. But if there is issue by her, the right of presenting is vested in him as tenant by the courtesy. And it shall be so although the right of patronage, so far as it was in the wife, descends to her heir; and though the wife

<sup>5</sup> Plowd. 418. Cro. Jac. 275. Co. Litt. 338.

<sup>h</sup> Cro. Eliz. 7.

<sup>i</sup> Wals. c. 7.

<sup>k</sup> Idem.



did never present to it, but died before the church voided, she having thereby only a seisin in law ; and if such husband die after having presented to such church, and before the church is filled, the husband's executors shall have the turn, and not the heirs<sup>1</sup>. Such marriages as are invalid for any of the reasons which are cognizable by the ecclesiastical court, cannot be considered as null in any temporal court, unless a sentence be actually obtained in the ecclesiastical court, declaring them so to be. Therefore all property transferrable in consequence of such marriage must be adjudged in the same manner as if the marriage was, to all intents and purposes, legal and unexceptionable, until such marriage is declared null and void. And if no such disannulling takes place during the life-time of the parties, they are esteemed valid to all civil purposes, and the matter is no longer cognizable in the ecclesiastical court. Thus a man who married his first wife's sister, she dying, the ecclesiastical court was moved to annul the second incestuous marriage, and bastardize the issue ; but the court of King's Bench granted a prohibition to stop proceedings, founded on this principle of reason, that one of the parties being deceased, the ecclesiastical censure could not operate, and all sentences there pronounced being *pro salute animarum*, no such effect could in this case be produced. The marriage therefore was considered as valid with respect to the issue, who were deemed legitimate ; but the surviving offender, the husband, was permitted to be proceeded against for incest<sup>m</sup>.

An husband giving a bond to his wife for payment of a sum of money in case she survive him ; and after becoming bankrupt, the wife shall claim no dividend out of his estate by virtue of such bond. But the lord chancellor observed, that a bottomree bond entered into, and the ship returning

<sup>1</sup> Watf. c. 9.

<sup>m</sup> Salk. 548. See B. 1 c.

safe before the dividend actually made, she should receive her share of the dividend, though the bond was contingent at first, because the contingency was then at an end<sup>a</sup>. But if a feme-covert agree to sell her inheritance, on condition that part of the money arising from the land sold shall be to her own proper use; and such proportion is vested in the hands of trustees, such money shall not be liable to the husband's debts, even though the wife afterwards agrees that it should be liable<sup>o</sup>.

An husband promises to leave his wife 400l. if she will join in sale of her lands, and let him have the money to trade with; she joins, and six months after he gives bond to a stranger to pay his wife 300l. after his death; and Hale ch. j. was of opinion, that this bond was not fraudulent against creditors<sup>p</sup>.

If a feme-sole is seised of lands in fee, of which she is disseised, and afterwards marries, the husband and wife, in right of the wife may enter, and oust the disseisor; but if during her coverture no such entry is made, and the disseisor die seised, the wife cannot enter after the death of her husband, because she should have done it when sole, and it was her folly to take such an husband as would not enter before the descent to the disseisor's heir. But if the woman was within age at the time of her marriage, then the dying seised shall not, after the death of her husband, take away her right of entry to oust the heir, because no folly can in that case be accounted to her before coverture, and afterwards she cannot enter without her husband<sup>q</sup>.

Lands are given to A and to B, a feme-sole, and the heirs of the body of A. A and B intermarry; the husband suffers

<sup>a</sup> Case of Chawell and Cassanet, M. 1728. Bar. & Fem. 73.  
<sup>p</sup> 2 Lev. 148.

<sup>q</sup> Bar. & Fem. 199.

<sup>o</sup> 2 Vern. 64

a common recovery against himself only, without naming his wife: the recovery is falsified for one moiety, because the wife who was joint-tenant with A was not named, and a party to the recovery. It therefore cannot bind the moiety of the wife<sup>r</sup>.

If a feoffee to uses whether man or woman marries, the wife who was assigned her dower is not liable to perform the use, nor the husband who retained the possession as tenant by the courtesy; because in either case they were not parties to the trust, but came in by act of law<sup>s</sup>. But at present trusts are made to answer all the beneficial ends of uses without their inconveniencies or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration, to a purchaser without notice; which as *cestui que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to forfeiture, to leases, and other incumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subject to dower, more to a cautious adherence to some hasty precedents<sup>t</sup>, than from any well-grounded principle. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs<sup>u</sup>, because the trust could never be intended for his benefit.

A man seised of land, may make a kind of conveyance called a covenant, to stand seised to uses by which he covenants in consideration of blood or marriage; that he will

<sup>r</sup> Lord Norris's Case, 1 Leon. 270.

<sup>s</sup> Blackst. b. II. c. 20.

<sup>t</sup> 1 Ch.

Rep. 254 2 P. W. 640.

<sup>u</sup> Hard. 494. Gold of Bargetts and Wheate,

H. 32. G. II.

stand seised of the same to the use of his child, wife, or kinsman, for life in tail or in fee. The party intended to be benefited having by this means acquired the use, is thereby put at once into corporal possession of the land ; but this kind of conveyance can only take effect, when made upon such weighty and interesting considerations as those of blood or marriage <sup>x</sup>.

A. marries B. an administratrix, who had wasted a great part of the estate before the marriage. Afterwards, a suit is brought against them for a distribution, and a decree is obtained, when the wife dies ; and the court decree, that the husband is not to be charged further, than with what came to his or his wife's hands after marriage <sup>y</sup>.

Goods devised to a feme-covert for life, and after her decease to A. if the wife living apart from her husband waste such goods, the husband shall on her death be charged by A. to make good such waste <sup>z</sup>.

The husband is not chargeable in a court of law or equity, with any debts of his wife after her decease ; no not even though he had a large fortune with her <sup>a</sup>.

If an husband seised *juræ uxoris*, shall after the determination of his interest therein, hold over and continue in possession of the lands or tenements, he is adjudged to be a trespasser, and the reversioner or remainder man, may once in every year, by motion in the court of chancery, procure the *cestui que vie*, or holder of the lands for life, to be produced by the tenant of the lands ; or he may enter thereon in case of a refusal, or wilful neglect <sup>b</sup>. And if the husband holds over the land of which he is so seised after the deter-

<sup>x</sup> Bacon's Use of the Law, 251.

<sup>a</sup> Cases, Talb. 173. 3 P. W. 409.

<sup>y</sup> 2 Vint. 118.

<sup>z</sup> 1 Vern. 143.

<sup>b</sup> 6 Ann. c. 7.

mination of his right by the death of his wife, the reversioner is entitled to recover by action of debt, a rent of double the annual value of the premises in case he himself hath demanded and given notice in writing to deliver the possession <sup>c</sup>.

An husband seised in right of his wife, is entitled to emblements of such inheritance on her death <sup>d</sup>.

Where the wife is executrix and legatee, if she claims as executrix, marries, and then dies; if the second husband will have advantage of it, he must take letters of administration, *de bonis non* of the first husband, and not of the wife; but if she had claimed the land, and the term in it as legatee, and had not been in possession, administration taken of the rights and debts of the wife had been good as to that intent, though the wife was not in actual possession, but only had a right to it; and of such things in action the husband might be executor or administrator to his wife; and if the husband takes administration differently, and brings action, he will be nonsuit <sup>e</sup>.

### *Of Tenant by the Curtesy of England.*

**A** Tenant by the curtesy of England is, where a man marries a woman seised of lands or tenements in fee simple, or fee tail; that is, of any estate of inheritance; and has by her issue born alive, which was capable of inheriting her estate. In that case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England <sup>f</sup>. And the husband is entitled to do homage to the lord for the wife's lands alone. This law prevails like-

<sup>c</sup> 4 Geo. II. c. 28.

Litt. Sect. 35. 52.

<sup>d</sup> Litt. sect. 68.

<sup>e</sup> Lev. 226.

wife in Scotland and Ireland<sup>c</sup>. By the feudal law, if a woman seised of lands had issue by her husband and died, the husband was the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it; and therefore the heir apparent of the tenant by the curtesy, could not be in ward to the lord of the fee, during the life of such tenant. As soon therefore as any child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis*, and was called tenant by the curtesy *initiate*. And this estate being once vested in him by the birth of the child, was not liable to be determined by the subsequent death or coming of age of the infant<sup>d</sup>. There are four requisites necessary to make a tenancy by the curtesy,—marriage,—seisin of the wife—issue—and death of the wife. The marriage must be canonical and legal. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law; but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments, a man may be tenant by the curtesy, though there has been no actual seisin of the wife; as in case of an advowson, as has been already shewn in page 158, where the church has not become void in the life time of the wife, which a man may hold by the curtesy, because it is impossible to have had actual seisin of it, and *impotentia excusat legem*. If a wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king by prerogative is entitled to them, the instant she herself has any title, and since she never could be rightfully seised of these lands, and the husband's title depends entirely on her seisin, the husband can have no title as tenant by the curtesy<sup>e</sup>. The issue must be born alive. Some have had a notion, that it

<sup>c</sup> By an Order of Hen. III.<sup>d</sup> 2 Bac. Ab. 659.<sup>e</sup> Plow. 263.

must be heard to cry ; but that is a mistake. Crying indeed is the strongest evidence of its being born alive, but it is not the only evidence. The issue also must be born during the life of the mother ; for if the mother dies in labour, and the cæsarian operation is performed, the husband in that case shall not be tenant by the curtesy ; because at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while yet in its mother's womb ; and the estate being once vested, shall not afterwards be taken away<sup>k</sup>. In gavel-kind lands a husband may be tenant by the curtesy without having any issue<sup>l</sup>. But in general there must be issue born ; and such issue must also be capable of inheriting the mother's estate. Therefore if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby entitled to be tenant by the curtesy ; because such female issue can never inherit an estate so descending. And this seems to be the true reason why the husband cannot be tenant by the curtesy of any lands, of which the wife was not actually seised ; because in order to entitle himself to such estate, he must have begotten issue, that may be heir to the wife ; but no one by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised ; and therefore as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence we may observe, with how much nicety and consideration the old rules of law were framed ; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture. For whether it were born before or after the wife's seisin of the lands ; whether it be living or dead at the time of the seisin, or at the time

<sup>k</sup> Co. Litt. 29, 30.<sup>l</sup> Ibid.

of the wife's decease, the husband shall be tenant by the curtesy. And it was before observed, that he does this *initiate*, and may do many acts to charge the lands; but his estate is not consummate till the death of the wife, which is the last requisite to make a tenant by the curtesy<sup>m</sup>. But though a man cannot be tenant by the curtesy of a bare right, title, use, reversion or remainder expectant upon any estate or freehold, yet if such particular estate determine to the wife during coverture; he shall then inherit at her decease. A copyholder may, in many manors, be tenant by the curtesy, subject, however, to be deprived of it upon the concurrence of those circumstances which the will of the lord promulged by immemorial custom has declared to be a forfeiture, or absolute determination of his interest. As, in some manors, the want of issue male; in others the cutting down timber; the non-payment of a fine, and the like; but the freehold of the whole manor abides always in the lord only, who hath granted out the use and occupation, but not the corporal seisin or true possession of certain parts or parcels thereof to such his customary tenant at will<sup>n</sup>. If a woman, the tenant in tail general, marries and has issue, which issue die, and afterwards the wife; notwithstanding the estate is thereby determined, yet the husband shall be tenant by the curtesy<sup>o</sup>.

<sup>m</sup> Blackst. b. II. c. 8.  
Litt. Sect. 35.

<sup>n</sup> Blackst. b. II. c. 9.

<sup>o</sup> 3 Co. 36.



## C H A P. VI.

*Of the Condition of a Wife.**Privileges of a Queen-Consort.*

**T**HE wife of the reigning king is, in consequence of her marriage, entitled to many peculiar privileges. She alone is exempt from the general laws respecting *femes-covert*, which do not suffer them to be considered as capable of possessing any property in their own right; on the contrary the queen-consort is entitled to a legal and separate existence, independant of her husband; she may purchase property in lands, and make conveyance of lands, and do other acts peculiar to the right owner, without the interference of her husband. A grant likewise made by the king to her is a good one, which is not the case with any other husband's grant to his wife. She may also sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as land, and have a right to dispose of them by will; and in all legal proceedings she is looked upon as a *feme-sole*, and not as a *feme-covert*, as a single, not as a married woman<sup>p</sup>. She may be endowed, although an alien, for the law makes a particular reserve on her account, all widows who are aliens being barred of their dower.—The queen-consort cannot be seised of lands to trust, or any use but her own. So that she may hold land, but is not compellable to execute the trust. Further, the queen pays no toll, and is not liable to any amercement in any court: but in every other respect she is upon the same footing with other subjects, being to all intents and purposes

<sup>p</sup> Finch. L. Co. Litt. 133.

the king's subject, and not his equal<sup>9</sup>. Queen Gold, or *aurum reginæ*, is a royal revenue belonging to every queen-consort of England, during her marriage with the king of England; and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, in consideration of any privileges, grants, licenses, pardons, or other matter of royal favour conferred upon him by the king: and it is due in the proportion of one-tenth part more, over and above the entire offering or fine made to the king, and becomes an actual debt of record to the queen's majesty, by the mere recording the fine<sup>r</sup>. As, if an hundred marks of silver be given to the king for liberty to take in mortmain; or to have a fair, market, park, close, or free warren: there the queen is entitled to ten marks of silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of Queen Gold, or *aurum reginæ*<sup>s</sup>. But no such payment is due for any aids or subsidies granted to the king in parliament, or convocation; nor for fines imposed by courts on offenders, against their will; nor for voluntary presents to the king, without any consideration moving from him to the subject; nor for any sale or contract, whereby the present possessions or revenues of the crown are granted away or diminished<sup>t</sup>. The revenue of our ancient queens, before and soon after the conquest, seems to have consisted in certain reservations of rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in domesday-book, after specifying the rent due to the crown, to add likewise the quantity of gold, or other renders reserved to the queen. These were frequently appropriated to particular purposes; to buy wool for her majesty's use; to purchase oil for her lamps; or to furnish her attire

<sup>9</sup> Finch L. 185.

<sup>r</sup> Pryn. Aur. Reg. 2.

<sup>s</sup> 12 Rep. 21.

<sup>t</sup> Inst. 358.

<sup>u</sup> Madam Hist. ench. 245.

from head to foot, which was frequently very costly, as one single robe in the fifth year of Henry II. stood the city of London in upwards of fourscore pounds<sup>u</sup>: a practice somewhat similar to that in the eastern countries, where all the cities and provinces were specifically assigned to purchase particular parts of the queen's apparel. And for a further addition to her income, this duty of Queen Gold is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the crown, by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of Domesday, and in the great pipe-roll of Henry the First. In the reign of Henry the Second, the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer, written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen-consorts of England till the death of Henry VIII. though after the accession of the Tudor family, the collecting of it seems to have been much neglected; and there being no queen-consort afterwards till the accession of James I. a period of near sixty years, its very nature and quantity became then a matter of doubt: and being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable, that queen Ann, the consort of that prince, (though she claimed it) yet never thought proper to exact it. In 1635, 11 Charles I. a time fertile of expedients for raising money upon dormant precedents, in our old records, that king, at the petition of his queen Henrietta Maria, issued out his writ for levying it; but afterwards purchased it of his consort at the price of ten thousand pounds, finding it perhaps too trifling and troublesome to

<sup>u</sup> Madox. Hist. ex ch. 242.

levy. And when afterwards at the restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honour to his abilities as a painful and judicious antiquarian, endeavour to excite queen Catherine to revive this antiquated claim<sup>v</sup>.—By second Geo. III. c. 1. the sum of 100,000l. per annum, arising out of the post-office, is settled on the present queen-consort in case she survives his majesty, free from all taxes and charges. Likewise his majesty is empowered to grant to his consort the palace of Somerset-House, and the lodge in Richmond Great Park, with the lands and premises belonging thereto. And by the 15th Geo. III. c. 33. Buckingham-House, with certain lands adjacent, are vested in trustees to the use of his majesty, in lieu of Somerset-House, and the former is hereafter to be known and described by the name of the Queen's-palace.

*Wife transacting for her Husband.*

**A** Wife, a friend, a relation, that used to transact business for a man, are *quoad hoc* his servants, and the principal must answer for their conduct. For the law implies that they all act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience<sup>w</sup>.

*Feme-covert entering into a Bond with a Stranger.*

**A** Bond entered into by a feme-covert, or an infant, is void: but if either of them enter together with a stranger, who has neither of these disabilities, into an obliga-

<sup>v</sup> Blackst. b. I. c. 4

<sup>w</sup> Blackst. b. I. c. 14.

tion, it shall bind the stranger, though it is void as to the woman or infant.

*The Wife of a Husband who has adjured the Realm.*

**A**N husband who has adjured the realm, or is banished, is thereby *civiliter mortuus*, and being disabled to sue or be sued in right of his wife, she must be considered as a feme-sole; for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her; that not being able to have any redress from her husband, they shall not have any against her<sup>x</sup>.

*Feme-covert, a Popish recusant Convict.*

**A** Married woman who is a Popish recusant, convicted in a court of law of not attending the service of the church of England, is liable to suffer a forfeiture of two-thirds of her dower or jointure. She may not be executrix or administratrix to her husband, or have any part of his goods; and whilst she remains a feme-covert, she may be kept in prison, unless redeemed by her husband, either with the payment of 10l. a month, or one-third of his lands<sup>y</sup>. But it is said that such wife is entitled to one-third of the surplusage of her husband's effects in case he dies intestate, although she be a Papist. For in the case of dying intestate, the distribution is the act of the law. It is the legislator that gives these distributive shares to the widow, and next of kin. It is a succession *ab intestato* to a personal estate, similar to a descent of lands, where an heir, though a Papist, if above the age of eighteen years and six months may inherit<sup>z</sup>. And the editor of Pere Williams observes in a note<sup>a</sup>, that from

<sup>x</sup> Co. Litt. 133. 3. Bulst. 188.  
Davies and Davis, 3 P. W. 48.

<sup>y</sup> 7 Jac. I. c. 6.  
<sup>a</sup> Page 49.

<sup>z</sup> T. 1730.

the same reason it should seem, that a Papist is capable of taking as tenant by the curtesy, or tenant in dower.

*Feme-covert may purchase an Estate.*

**A** Married woman may purchase an estate without the consent of her husband ; and the conveyance is good during coverture, till he avoids it by some act declaring his dissent ; and though he does nothing to avoid it, or even if he actually consents, the feme-covert may, herself, after the death of her husband, waive, or disagree to the same ; nay, even her heirs may waive it after her, if she dies before her husband ; or if in her widowhood she does nothing to express her consent or agreement. But the conveyance, or other contract of a feme-covert, except by some matter of record, is absolutely void, and not merely voidable, and therefore cannot be affirmed or made good by any subsequent agreement<sup>b</sup>. And this restricted right of purchasing lands which the law allows to femes-covert is granted, because it does not make the property of the husband liable to any disadvantage, nor does it support a separate will, or power of contracting in the wife, but here the will of the wife is supposed concurrent with that of the husband, as it is supposed to be a beneficial contract ; and therefore if he neither agrees nor disagrees to such purchase, his conduct shall be interpreted to signify a tacit consent ; and because the wife during her coverture is supposed to have no will of her own, she is not indispensably bound to the contract when she becomes sole<sup>c</sup>.

*A Feme-sole Merchant.*

**A** Feme-covert is warranted by law to sell goods in open market, and her husband cannot reclaim any goods so sold, provided such woman is usually accustomed to trade

<sup>b</sup> 27 Hen. VIII. c. 10.

<sup>c</sup> 1 Inst. 3. 2 Bacon's Ab. 252.

for herself. A feme-covert in London, being a sole trader, is liable according to the custom to a commission of bankrupt. And the daughter of a freeman of London, being a married woman, if she trades separately from her husband, she may be a bankrupt<sup>d</sup>.—An action was brought by the assignees of Jane Cox, a sole trader in London, and a bankrupt, against the assignees of John Cox, her husband, who was also a bankrupt, in order to try whether the plaintiffs, as assignees of Jane, had a right to certain goods in the millinery trade carried on by her after her marriage, which goods had been seized by the assignees of John Cox her husband. It was tried by lord Mansfield at Guildhall, by a special jury, and a verdict was given for the plaintiffs, the assignees of Jane Cox, subject to the opinion of the court of King's Bench upon the following facts and custom. The commission against John Cox the husband, issued on the 13th of March 1764, and the commission against Jane his wife, on the 26th of April following. The custom of London, taken and translated from Liber albus in the town clerk's office, is as follows: "Where a feme, covert of a husband, useth any craft in the said city, on her sole account, whereof the husband meddleth not, such a woman shall be charged as a feme sole concerning every thing that toucheth her craft. And if the husband and wife shall be impleaded, in such case the wife shall plead as a feme sole; and if she is condemned, she shall be committed to prison till she has made satisfaction; and the husband and his goods shall not in such case be charged and impeached." It appeared, that Jane Cox was a sole trader; carried on a separate trade within the city of London, and that the fans for which the action was brought, were part of the effects of her sole trade; and that the assignees of her husband's

commission seized them the day the commission issued against him. The question for the court therefore was, whether the assignees of John the husband, had a right to take the separate effects of Jane his wife, who was a sole trader, and apply them towards satisfying the debts of the husband, in prejudice of the separate creditors of the wife? And whether a commission of bankruptcy may issue against a married woman being a sole trader?—It was insisted, that wherever a wife, being a sole trader, according to the custom of London, continues liable to her own separate debts, her property in her effects must necessarily remain in her for the purposes of the trade, otherwise she would be liable to perpetual imprisonment. On the other hand it was insisted, that the husband may put an end to his wife's sole trade whenever he pleases, and at the end of it, the profits of it will be his property: his power over her effects, and his property in them, always remain in him though subject to a right of action in her creditors. And as the custom is totally silent as to the interest and property of the husband in the wife's goods, therefore it should be left to the common law. It was insisted, that every particle of interest in the bankrupt passes to his assignees. And here the property was vested in the husband's assignees before the wife's assignees had any right. It was further insisted by Mr. Dunning, that a woman marrying, and using a trade sole, is not within the spirit of the bankrupt laws, though within the letter; and that this is only the second instance of such a commission issuing; there was such an one in the year 1741, but that was not litigated, it passed *sub silentio*. The statutes of queen Elizabeth and king James, respecting bankrupts, make provisions that are penal, and even capital, which must relate to free agents. But a married woman is not so. She is under the coercion of her husband; he may prevent her from surrendering. Other provisions in these  
acts



acts relate to lands, and chattels real, and choses in action, and these were never meant to be taken from the married woman. She may have dower or jointure, and how is she to convey her right? It was not meant to make her goods liable to such a severe execution as these acts of parliament render the objects of them liable to; she has not such a sole property in them as to exclude the rights of her husband. Her creditors may take their remedy under the commission issued against her husband. Lord Mansfield said, that as to the single instance of a commission having ever been actually issued before against a feme-covert sole trader, it is perhaps only the first that has been found, it does not follow therefore that there was certainly none before it. There probably were others, though not now recollected, or particularly ascertained. His lordship took notice, that Mr. Dunning had put the question upon this point, whether the husband is totally excluded from all power over the effects of his wife; whereas the present question is not between the husband and wife, but between his and her creditors; she is no party to this case, therefore it is not necessary to go into that question; but taking it for granted, that a husband might put a stop to his wife's separate trade *in futuro*; and after that might have a right to the residue, (I say *in futuro*, for he certainly cannot do it with a retrospect) yet it does not follow, that he can take to himself what belongs to her creditors. This would destroy the custom by rendering it nugatory and ineffectual. And if he himself could not prejudice her creditors, his assignees cannot do it. The *feme* sole trader in London, under this custom, must indeed bring her action in London, but such custom will be allowed in any other court. In a defence by the husband, perhaps there might be difficulty in the wife's having a remedy herself against her husband; but there is none as to the creditors of the wife; they are entitled to a remedy for the seizure  
of

of her effects, out of which they were to be paid their just debts ; the separate effects of the wife are in the first place liable to her separate creditors ; but if they were liable in the first place to the husband's debts, this would destroy the end of the custom. In joint commissions of bankruptcy, joint debts are first paid, then the separate debts. So also where there are different joint commissions. As to the second point ; whether she is liable to a commission ? The statutes of bankruptcy extend to the city of London ; and the words of the statutes take in this case ; and it is for the benefit of the wife that she should be liable to a commission, because otherwise she would be liable to perpetual imprisonment. It is also for the benefit of the creditors, who cannot by reason of this custom come at the husband. There is no reason to take this case out of the acts relating to bankruptcy : the husband himself was not liable to the wife's creditors, nor had he any demand upon them. The consequences of her bankruptcy as a sole trader, concern only the relation in which she stands to her creditors and they to her : as to the precedents, there is no method of searching for commissions that may have issued against sole traders ; but there is one instance produced of such a commission, which is very express <sup>e</sup>. As to Mr. Dunning's supposed inconveniences, this custom affects no rights but such as are the subject of the custom ; not marital or any other rights ; and as to the danger of the wife, from the coercion of the husband, she will never be liable to the guilt of a capital offence, where she was under an invincible necessity. And the court were of opinion, that a commission might be taken out against her as a sole trader, with respect to her separate effects in trade ; and therefore decreed judgment for the

<sup>e</sup> Cecil and Juxon against Juxon, 1 Atk. 278.

plaintiffs *f*.—It has been said, that a man marrying a woman who is a sole merchant trader, who dies, and at her death she is indebted to several persons for wares, which she had bought of them for the use of her shop or trade; that such husband is deemed exempt from paying the creditors of such wife, although the goods come into his possession in right of being her husband; upon plea made by him that he is neither executor or administrator to the deceased *s*. If a feme-covert trades by herself, in any trade with which her husband doth not intermeddle, and buys and sells in that trade, there the feme shall be sued, and the husband named for conformity only. And if judgment be given against him, execution shall be only against the feme *h*.—B was a vintner, and being pressed for a soldier went abroad, leaving a wife, who took a house, and bought wine of L, who trusted her as a feme-sole merchant. Afterwards the husband returned, and then the wife refused to pay for the wine; and the question was, whether she was a feme-sole merchant by the custom. The court was divided. Her husband having exercised the same trade, it was thought that the wife did not come within the custom; and some thought that feme-sole merchant ought to be the widow of a tradesman who takes a second husband; and she after exercises the trade of her first husband. But on the other hand it was held, that if the husband interfere with the trade of the wife, then she is not a feme-sole merchant. But if the husband is beyond sea, or becomes bankrupt, or leaves his trade; or they both exercise the same trade distinctly by themselves, and do not intermeddle with each other, the wife is sole merchant *i*.

*f* La Vie and another, Assignees of Jane Cox, against Phillips and others, Assignees of John Cox, M. 6 Geo. III. 3 Bur. Mansf. 1776. *s* Bar. & Fem. 291. *h* Cro. Car. 69. *i* Litt. Rep. 31. 1 Croke, 67.

*No Heriot or Mortuary paid on the Death of a Feme-covert.*

**T**HE lord can claim no heriot on the death of a feme-covert, for she can have no ownership in things personal<sup>k</sup>. Likewise no mortuary is to be paid to the minister on her death.—A mortuary is a kind of ecclesiastical heriot, being a customary gift claimed by, and due to the minister of the parish on the death of his parishioners. They are considered as a kind of voluntary bequest to the church, as an expiation or atonement to the clergy for the personal tythes, and the other ecclesiastical dues which the laity in their lifetime might have neglected or forgotten to pay<sup>l</sup>.

*Feme-covert making a Will; and Revocations of Wills by Marriage.*

**A** Married woman is not considered as possessing sufficient liberty to make a will but under certain restrictions, and in certain situations. In the statute of wills<sup>m</sup> such are expressly excepted from having a power of devising land; and they cannot even bequeath chattels, without the license of their husband. For all a wife's personal chattels are absolutely the husband's. To qualify this restriction, the husband upon marriage frequently covenants with the wife's friends to allow her that license<sup>n</sup>. Which is more properly his assent; for it extends only to a specific will<sup>o</sup>, and does not reach in its full force any other will that may be made to cancel and annul that so described. Such permission before marriage to make a will can only be effectual to repel the husband from his general right of administering his wife's effects, and administration shall be granted to her appointee

<sup>k</sup> Keilw. 84. 4 Leon. 239.<sup>l</sup> Blackst. b. II. c. 28.<sup>m</sup> 34 & 35

Hen. VIII. c. 5.

<sup>n</sup> Doct. & St. dial. x. c. 7.<sup>o</sup> Bro. Ab. tit.

devise 34. Str. 891.

with such testamentary paper annexed, So that in such case the woman makes no will at all, but only something like one, operating in the nature of an appointment; the execution of which the husband by his bond, agreement, or covenant, is bound to allow. And if the wife has any pin-money, or separate maintenance, it has been asserted that the savings which she may make therefrom, she may dispose of by testament without the control of her husband. And after the wife's death the proving this writing in the spiritual court will not give it the authority of a will, but it will still be considered as an instrument only, or an appointment of such sum or other thing in pursuance of the power; and before it is proved in the spiritual court as a testamentary conveyance, the husband ought to be examined there as to his consent; nor till then will it have the effect and operation of a will<sup>p</sup>. And a will made by a feme-sole, if she afterwards marries and survives her husband, the will shall not revive upon the husband's death<sup>q</sup>.—A man while single made his will, and devised all his personal estate; afterwards he married, and had several children, and died without other will or disposition. It was ruled, that there being such an alteration in his estate, and his circumstances being so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind<sup>r</sup>. —A man made a will, and appointed one, (who was no relation) his executor: he afterwards went abroad, where he became governor of one of the plantations, and sent over for an English woman of his acquaintance, whom he married and had children by. He died without any revocation of his will: yet it was determined, that this total alteration of

<sup>p</sup> Case of Henry and Phillips, July 1740, by lord Hardwicke. 2 Atk. 49.

<sup>q</sup> Burn's E. L. art. Wills.

<sup>r</sup> Lugg and Lugg. 2 Salk. 492. 1. Raym. 441.

his circumstances was an implied revocation<sup>r</sup>. But any feme-covert may make her will of goods which are in her possession, *in autre droit*, as executrix, or administratrix, for such can never be the property of the husband<sup>s</sup>. But this rule does not hold good where the wife appoints no executor, but bequeaths the goods whereof she is executrix by devise or legacy; in such case the will is void, because an executor may not dispose of the goods of the testator otherwise than to the use of the testator, to the payment of his debts, and performance of his will; and therefore may not give or devise the same by legacy: but when an executor only makes another executor, such second executor stands chargeable and accountable for the distribution of the first testator's goods as the former executor did<sup>u</sup>. So likewise where a feme-covert is not only executrix but legatee also; and hath accepted of the thing bequeathed not as executrix but as legatee; in such case her will is void<sup>v</sup>.—Husband and wife separated and living apart, it being agreed between them that the wife should have 150*l.* per annum separate maintenance; from which she having saved certain sums of money put them out to interest, and took bonds in a friend's name, which money she disposed of by will; and this was established in chancery to be a good disposition<sup>w</sup>.

*Feme-covert cannot be barred by Non-claim.*

A Married woman is exempt from the regulation which limits the right of all strangers whatsoever, to make claim of an estate on which a fine has been levied, unless claim is made within five years after proclamations made, for all femes-covert have five years allowed them and their heirs after the death of their husbands<sup>x</sup>.

<sup>r</sup> Eyre and Eyre, 1 Pere W. 304.

<sup>s</sup> Prec. Chan. 44. Blackst. b. II.

c. 32.

<sup>u</sup> Law of Test. 35.

<sup>v</sup> Ib. 36.

<sup>w</sup> Bar & Pem. 257.

<sup>x</sup> 4 Hen. VII. c. 24.

*Joining with her Husband in levying a Fine.*

**A** Feme-covert may join with her husband in levying a fine, but previous to executing the fine, she is examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband; which makes such a method the common, as indeed it is the only safe method whereby a married woman can join in the sale, settlement, or incumbrance of any estate. And if she thus joins her husband to raise a sum of money by way of mortgage, this shall bind her <sup>x</sup>.—If a feme-covert levies a fine of her own inheritance with her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record: but the husband may enter and defeat it, either during the coverture to restore him to the freehold he took *jure uxoris*; or after her death, to restore himself to the tenancy by the curtesy; and if the husband avoids it during the coverture, the wife, or her heirs, shall never be bound by it afterwards <sup>y</sup>.

*Wager of Law.*

**A** Feme-covert, when joined with her husband, may be admitted to wage her law, which is an ancient method of clearing a defendant from the charge of debt contracted by word of mouth; it likewise lieth in a real action; where the tenant alledges he was not legally summoned to appear, as well as in mere personal contracts. It is done in the following manner. The person who has waged or given

<sup>x</sup> 2 Vern. 436.<sup>y</sup> Bro. tit. Fines 33. Co. Lit. 46.

security to make his law, brings with him into court eleven of his neighbours, for by the old Saxon constitution, every man's credit in courts of law depended upon the opinion which his neighbours had of his veracity. The defendant then standing at the end of the bar, is admonished by the judge of the nature and danger of a false oath; and if he still persists, he is to repeat this or the like oath: "Hear this, ye justices, that I do not owe unto Richard Jones the sum of 10l. nor any penny thereof, in manner and form, as the said Richard has declared against me, so help me God." And thereupon his eleven neighbours or compurgators, shall avow upon their oath, that they believe in their conscience, that he or she said the truth. So that the defendant must be sworn *de fidelitate*, and the eleven *de credulitate* <sup>a</sup>.—This trial, by negative proofs, though out of practice, is still in being, and may be set up by a defendant in an action of debt. Hence it has happened, that for a long time past, *action of debt* in such cases have not been brought, but another called, *an action on the case*, is the usual method; which admits the parties on both sides, as to the point of debt, *vel non debet*, to an examination of witnesses <sup>a</sup>.

### *A Husband's Suicide affecting a Survivorship in a Wife.*

**I**F a husband and wife are jointly possessed of a term of years in land, and the husband commits an act of suicide, the wife cannot enter on her husband's moiety of the possession, but it becomes forfeited to the crown; for by putting an end to his own life, he forfeited the term, by which the king obtains title paramount to the wife's claim by survivorship, as that could not devolve to her until the decease of her husband, which he must not hasten by his own act <sup>b</sup>.

<sup>a</sup> Co. Litt. 295.

<sup>a</sup> Sullivan's Lectures, p. 40.

<sup>b</sup> Finch. L. 216.



*A Wife's Freehold not affected by the Act of the Husband.*

**N**O act by the husband can work a discontinuance of, or prejudice the inheritance or freehold of the wife; but upon his death she or her heirs may enter on the lands in question <sup>c</sup>. Formerly the law was otherwise, for the alienation of the husband who was seised in right of his wife, worked a discontinuance of the wife's estate <sup>d</sup>.

*Acts of the Husband not binding the Wife.*

**I**F an husband possessed in right of his wife of a term, is condemned in a judgment, or acknowledges a statute, and dies; this shall not be extended on the wife <sup>e</sup>. But if the husband be indebted to the king, and purchases lands for years to him and his wife, and dies, this land shall be put in execution for the debt <sup>f</sup>.—If a lease be made to husband and wife, and they covenant to do no waste, or to repair houses, and the husband dying the wife holds it; if the wife commit waste, and do not repair the house, no action lies against her, only she is tied to pay the rent, or to perform a condition made on the part of the lessor, but not to observe or perform the covenant of the lessee <sup>g</sup>.—A man marrying a woman entitled to a mortgage in fee, after marriage assigning his interest therein to trustees to call in the money, and lay it out in land, to be settled on the husband and wife, and their issue, remainder to the heirs of the husband. The husband and wife both dying, the mortgage shall go to the executor of the wife <sup>h</sup>.

<sup>c</sup> 34 Hen. VIII. c. 28.<sup>f</sup> 2 Roll. Abr. 157.<sup>d</sup> Blackst. b. III. c. 29.<sup>g</sup> 2 Brownl. 31.<sup>e</sup> Bar & Fem. 72.<sup>h</sup> 2 Vern. 401.

## C H A P. VII.

*Of Separation between Husband and Wife, as it affects their Property.**Separation by consent of Parties.*

**I**F husband and wife agree to live separate, and that the wife shall have so much a year, such agreement will be decreed in equity<sup>l</sup>. And where the husband proffers to be reconciled, and the wife refuses, the court will suspend the payment of the money, yet it will order all the arrears to be brought into court, and according as there is necessity vacate the decree, or give the wife upon ill-usage liberty to resort to, and have the benefit of it<sup>k</sup>.—If an husband turns away his wife, or uses her cruelly, by which means she is obliged to leave him; either upon her own, or her *prochein amy's* application to the chancellor, he will decree her a separate maintenance, suitable to her degree and quality, the fortune she brought, and her husband's circumstances<sup>l</sup>.—An husband covenanted with A, that his wife should be permitted to live separate from him, until they should give notice to each other in writing under their several hands, and attested by two witnesses that they would again cohabit; and until such notice the husband covenanted to pay to A the sum of 300l. yearly, by quarterly payments, for the use of the said wife. On action brought to recover 75l. for one quarter's payment, the defendant pleaded cohabitation; and that the true intent and meaning of the indenture was that the annual payment should cease, whilst the husband and wife should cohabit.

<sup>l</sup> Nelf. Chan. Rep. 73.  
B & F. 259.

<sup>k</sup> 1 Chan. Ca. 250.

<sup>l</sup> Cary, 124.

But

But judgment was given, for unless the cohabitation had been by notice, as prescribed by the indenture it was no bar <sup>m</sup>.— If there be a difference between husband and wife, and thereon lands are assigned to the wife, by the friends of the husband, and by his assent; if the wife grants a rent-charge to issue out of such lands to a stranger, the grant is void <sup>n</sup>.— If a legacy is given to a feme-covert who lives separate from her husband, and the executors pay it to the feme, the husband may bring a bill into chancery against the executor, and oblige him to pay it over again with interest <sup>o</sup>.

An husband and wife agree to part, and the wife's father agrees, upon the husband's giving him a note to pay back the wife's fortune, to save him harmless from any debts his wife may contract, and against all demands for her maintenance. The wife, with her child, went thereupon, and lived with the plaintiff her father, and were maintained by him: he therefore brought his bill, to have the portion paid. Which was decreed on his giving security to indemnify the defendant against the debts and maintenance of the wife and child: notwithstanding the husband then proffered to take his wife home, and maintain her and her child, and to allow the plaintiff for the time past <sup>p</sup>.—By marriage articles six thousand pounds, part of the wife's portion, was agreed to be vested in land, and settled in trust for the husband for life, then to his wife for life, remainder as a provision for younger children, remainder to the wife in fee: and the husband by his cruelty forces his wife to live separate from him; the court decreed the interest of six thousand pounds to be paid the wife for her separate maintenance, till cohabitation, there being no issue, the money lying dead, and it being a trust which is properly to be directed by the

<sup>m</sup> Case of Gawden & Draper, 2 Vent. 217.  
261.      <sup>p</sup> 2 Vern. 386.

<sup>n</sup> Perk, f. 8.

<sup>o</sup> 1 Vern.

court<sup>q</sup>.—A wife having been used with cruelty by her husband, became entitled to three thousand pounds as her share of her mother's personal estate, who died intestate. And it was decreed that the wife should have the interest of it for her separate use, and then to the husband if he survived, and afterwards the principal to be paid the issue; and if no issue, then to the survivor of the husband or wife<sup>r</sup>.

### *Divorce a mensa et Thoro.*

**A**N husband divorced *a mensa et thoro causa adulterii*, may release a legacy bequeathed to his wife. But if after such divorce the wife sues in the spiritual court for defamation, and recovers, and penance enjoined, and costs taxed, the husband cannot discharge this<sup>s</sup>.—After a divorce *a mensa et thoro*, an injunction was moved for to stop the husband's selling a term of the wife's. The court at first thought it should not be granted, for that the marriage continued; and the husband had the same power over it as before the divorce; but it was afterwards granted; for though the marriage continues notwithstanding such divorce, yet the husband does no act as an husband, nor the wife as a wife<sup>t</sup>.

### *Of Alimony.*

**A**LIMONY signifies the allowance which a married woman sues for, and is entitled to from her husband upon separation from him. A wife cannot sue for alimony during cohabitation. And although they be separated, yet if the husband maintains her, it bars her claim thereto<sup>u</sup>. If she elopes from her husband, the law will not

<sup>q</sup> 2 Vern. 493.

<sup>r</sup> Case of Nicholls and Danvers, E. 1711. 2 Vern. 671.

<sup>s</sup> Roll. Rep. B. & F. 69.

<sup>t</sup> 9 Mod. 43, 44.

<sup>u</sup> Viner's Ab. tit.

Bar. & Fe.

oblige the husband to allow her alimony <sup>v</sup>. The ordinary hath proper cognizance of alimony, it being a matter of ecclesiastical cognizance. And if the husband will not conform to the sentence pronounced against him, he may be excommunicated <sup>w</sup>. The process and consequences of which will be shewn in the third book. A feme-covert, who had by her husband's consent 50*l. per annum* settled upon her, and who had, upon a sentence in the spiritual court, obtained a decree for 50*l. more* for alimony, suggested by her bill, that her husband had, on purpose to defraud her, procured the tenants to surrender their estates, on which the said rents were reserved, and prayed, that it might be made good to her by a decree of the court of Chancery; but it appearing that she was a very lewd woman, and eloped; and the husband offering in his answer to take her again, the lord chancellor could make no other order in it, but that the husband should stand in the place of the tenants, and admit the rent payable, and she to recover it at law as well as she could <sup>x</sup>. No cause concerning the contract or dissolution of marriage, can be legally submitted to arbitration <sup>y</sup>.

*Operation of a Divorce, a vinculo Matrimonii.*

**I**F a lease be made to husband and wife during coverture (which gives them a determinable estate for life) and the husband sows the land, and afterwards they are divorced, *a vinculo matrimonii*, the husband shall have the emblements or profits of the crop in that case, for the sentence of divorce is the act of law <sup>z</sup>. But if an estate for life be determined by the tenant's own act, he shall not have the emblements. If land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced

<sup>v</sup> Ayl. Par. 58.

<sup>w</sup> Ib. 59.

<sup>x</sup> Case of Mildmay and Mildmay,

*B.* 1682. 1 Vern. 53.

<sup>y</sup> 1 Roll. Abr. 252.

<sup>z</sup> 5 Rep. 116.

*a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them <sup>a</sup>. A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties, or a dissolution of the marriage contract; even though the donees are each of them an hundred years old <sup>b</sup>.—On a divorce *a mensa et thoro*, the wife shall be entitled to sue out a writ of detinue of goods in frankmarriage, to procure a restitution of the goods given with her in marriage <sup>c</sup>.

## C H A P. VIII.

### *Of Widows.*

#### *Paraphernalia of a Wife.*

**S**UCH things as in the life time of the husband, the wife had the peculiar use of, are styled her paraphernalia <sup>d</sup>, in which are comprehended her apparel, bed, and jewels; ornaments for her person and other things; which, on his death, are to be allowed to her as her own immediate property, at the discretion of the court, according to the quality of her and her husband. By the civil law, those things belonging to the wife which are called her *bona paraphernalia*, are not to be put into the inventory of her husband's goods at his decease, neither are they subject to the payment of his debts. But what comes under this description of *bona paraphernalia*, is a matter of some doubt; some confining it to

<sup>a</sup> Co. Lit. 28.

<sup>b</sup> Lit. sect. 38.

<sup>c</sup> New N. B. 139

<sup>d</sup> See page 151.

her apparel merely, others to her bed, jewels, and ornaments for her person. The wife, after the death of her husband, shall have convenient apparel for her body, and not the executors of her husband; and of this convenience the court must be the judge. But she shall not have excessive apparel, and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. And if the husband delivers to his wife a piece of silk to make a garment, and dies, although it was not made into a garment in the life of the husband, yet the wife shall claim it as a part of her *paraphernalia*, and not the executors of the husband; but against the debts of the husband, a wife shall have no more apparel than is convenient\*. But the cases that have come before courts, have always been decreed in the most liberal manner possible in favour of the widow. As in the case of Hastings and Douglass, H. 9 Cha. I. a chain of diamonds and pearls worth 370l. usually worn by the lady of Sir John Davis, who was daughter of the earl of Castlehaven, being by her husband's will devised from her; Berkeley and Jones were of opinion, that she being the daughter of a nobleman, and permitted to use them frequently as the ornaments of her person, and they being convenient for her degree, she ought to have them as her *paraphernalia*; and when there are not debts to be paid, (as it doth not appear there are any in this case) she shall have them against the executors or administrators of her husband; and the husband cannot dispose of them from his wife by his will; but instantly by his death, the possession of them being in the wife's custody, the property is vested in her, and the husband cannot give them away; for it is not reasonable, that the husband should divest her of those jewels she usually wore, and which become one of her rank to wear. But Richardson and Croke were of opinion, that the will was good, and that she might not

take them contrary to the devise ; but if the husband had not bequeathed them, but had left them to the disposal of the law, and the question had been between the executor and administrator, and the wife, where there are no debts or legacies to be paid, or where there are assets to pay all debts and legacies, besides these jewels, there peradventure the law will allow her to take, and to enjoy them as her *paraphernalia* <sup>e</sup>.—And in the case of Cary and Appleton, M. 26 C. II. the husband devised the jewels which were the *paraphernalia* of the wife and died. They were decreed to the wife <sup>f</sup>. And lord Macclesfield gave it as his opinion in another cause, that *bona paraphernalia* are not deviseable by the husband from the wife any more than heir-looms from the heir, so that the right of a wife to her *paraphernalia*, is to be preferred to that of a legatee <sup>g</sup>.—But where the real estate is chargeable, together with the personal, for the payment of debts, and the personal estate is deficient, the *bona paraphernalia* shall become liable before the real estate shall come in. But then they are liable to claims of creditors only, and not to debts due to the heir at law <sup>h</sup>. And if creditors of the testator by judgment take the jewels after his death, in execution, when the heir or executor, or trustees have other assets sufficient to pay such debts, this is a default of the trustees, for which the widow ought not to suffer as to her *paraphernalia* <sup>i</sup>. And lord Hardwicke in a case in which the jewels of the wife were worth 3000l. said, the value makes no alteration, and there are several cases where there have been debts standing out against the husband, and yet the wife has been admitted as a creditor to the value of the *paraphernalia*, even upon trust estates created for the payment of debts <sup>k</sup>.—And when the question to be decided was,

<sup>e</sup> Cro. Car. 343. & Roll's Abr. 911.      <sup>f</sup> 1 Cha. Ca. 240.      <sup>g</sup> 1 P. W. 730.

<sup>h</sup> Case of Stubbs and Stubbs, H. 31 C. II. Cha. Ca. Finch, 415.      <sup>i</sup> 2 P. W. 80.

<sup>k</sup> Case of Northey and Northey, Dec. 6. 1740.      2 Atk. 78.

whether



whether *paraphernalia* should be liable to the payment of simple contract creditors and legacies. Lord Hardwicke said, at law, where the husband dies indebted, the widow cannot have her *paraphernalia*, but this court does not determine so strictly; for if the personal estate hath been exhausted in payment of specialty creditors, she shall stand in their place, as to so much of the real assets of the heir at law; for she has a prior right, and a superior one to legatees, who take only from the bounty of the testator<sup>1</sup>. So likewise if the husband pledge the wife's *paraphernalia*, and dies leaving a sufficient estate to redeem the pledge, and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate. But the husband may alienate then in his life time<sup>m</sup>. And where a daughter's portion was to be paid out of her father's personal estate, the court would not allow the widow to retain her *paraphernalia*<sup>n</sup>. And where by marriage articles it was agreed, that the wife should have no part of the husband's personal estate, but what he should give her by his will, this barred her *paraphernalia*, and of all jewels given to her by her husband in his life time<sup>o</sup>.

### *A Wife's reasonable Part.*

**I**N the city of London, and province of York, as well as in the kingdom of Scotland, the effects of one dying intestate after paying his debts are in general divided according to the ancient universal doctrine of the *pars rationabilis*<sup>p</sup>. If the deceased leaves a widow and children, his substance (deducting the widows apparel and furniture of her bed-chamber, which in London is called the widow's chamber) is divided into three parts, one of which belongs to the

<sup>1</sup> Case of Snellson and Corbet, Jun. 16, 1746. 3 Atk. 369.    <sup>m</sup> 3 Atk. 394.  
<sup>n</sup> Cha. Ca. Finch, 146.    <sup>o</sup> 2 Vern. 83.    <sup>p</sup> Lord Raym. 1329.

widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively in either case take one moiety, and the administrator the other<sup>q</sup>. If neither widow nor child the administrator shall have the whole<sup>r</sup>. And this portion, or dead man's part, the administrator was wont to apply to his own use till the statute 1 Ja. II. c. 17. declared that the same should be subject to the statutes of distribution, of which more will be said hereafter. So that if a man dies worth 1800l. leaving a widow and two children, the estate shall be divided into eighteen parts, whereof the widow shall have eight, six by the custom, and two by the statute, and each of the children five, three by the custom, and two by the statute: if he leaves a widow and one child, they shall each have a moiety of the whole; or nine of such eighteen parts, six by the custom, and three by the statute. If he leaves a widow and no child, the widow shall have three-fourths of the whole, two by the custom, and one by the statute: and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity with regard to the custom only<sup>s</sup>; but she shall be entitled to a share of the dead man's part under the statute of distributions, unless barred by special agreement<sup>t</sup>. And if any of the children are advanced by the father in his life-time with any sum of money, (not amounting to their full proportionable part) they shall bring that proportion into hotchpot with the rest of the brothers and sisters, but not with the widow before they are entitled to any benefit under the custom<sup>u</sup>: but if they are fully advanced, the custom entitles them to no further dividend. Thus far in the main the customs of

<sup>q</sup> 1 P. W. 341. Salk. 246.

<sup>r</sup> 2 Show. 175.

<sup>s</sup> 3 P. W. 16.

<sup>t</sup> 1 Vern. 15. 2 Ch. Rep. 251.

<sup>u</sup> 2 Freem. 279. 1 Ab. E. Ca. 155.

<sup>a</sup> P. W. 526.

London and York agree: but besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which time they cannot dispose of it by testament<sup>v</sup>: and if they die under that age, whether sole or married, their share shall survive to the other children: but after the age of twenty-one it is free from any orphanage custom, and in case of intestacy, shall fall under the statute of distributions<sup>w</sup>. The other, that in the province of York, the heir at common law, who inherits any lands either in fee or in tail, is excluded from any filial portion or reasonable part<sup>x</sup>. But notwithstanding these provincial variations, the customs appear to be substantially one and the same<sup>y</sup>.

### *Of Dower.*

**D**OWER, which Bracton derives from *dos*, among the Romans signified the marriage portion which the wife brought to her husband; but it bears a very different signification with us. Sir Will. Blackstone supposes dower to have been introduced into England by the Danish kings, which he grounds upon a circumstance recorded by the Danish historians, who relate that dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals<sup>z</sup>; but others ascribe its introduction to the Normans as a branch of their local tenures. Dower out of lands seems to have been unknown in the early parts of our Saxon constitution: for in the laws of king Edward<sup>a</sup> the wife is directed to be sup-

<sup>v</sup> 2 Vern. 558.

<sup>w</sup> Prec. Chan. 537.

<sup>x</sup> 2 Burn's Ecc. Law, 754.

<sup>y</sup> Blackst. b. II. c. 32.

<sup>z</sup> B. II. c. 8.

<sup>a</sup> Wilk. 73.

ported entirely out of the personal estate. Afterwards, as may be seen in gavel kind tenure, the widow became entitled to a conditional estate in one-half of the lands, with a proviso that she remained chaste and unmarried; as is usual also in copyhold dowers, or free-bench<sup>b</sup>. Dower is of four kinds.—By the common law.—By particular custom.—*Ad ostium ecclesie*.—Or, *ex assensu patris*.—Dower can be claimed at common law by none but a woman who is actually the wife of a man at the time of his decease. A divorce therefore *a vinculo matrimonii* bars her endowment<sup>c</sup>. But a divorce *a mensa et thoro*, though for the crime of adultery, does not affect her dower at the common law; but by statute<sup>d</sup>, if a woman elopes from her husband and lives with an adulterer, she shall lose her dower; unless her husband be voluntarily reconciled to her, and suffers her to cohabit with him; which cohabitation seems necessary in order to authenticate his reconciliation, upon which her right to dower is founded. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed. She must be a natural born subject, for no alien is capable of holding lands, consequently cannot be endowed<sup>e</sup>. If her husband dies attainted of treason the wife forfeits her dower. The law in this particular has undergone several changes. By the common law, this bar to the wife's dower extended beyond high treason, to felony, but by statute in 1547<sup>f</sup>, dower was allowed the woman even in cases of high treason as well as felony; but by a subsequent act of the same reign<sup>g</sup>, the wife of a man against whom an attainder of treason is in force at the time of his death, cannot demand her dower, but this restraint does not extend to widows of felons, against whom the crime of their husband is no bar. The widow

<sup>b</sup> Somner Gavelk. 51. Co. Lit. 33. Bro. tit. Dower, 70.

<sup>c</sup> Bract.

<sup>b</sup>. II. c. 39. sect. 4.

<sup>d</sup> West 1. 3 Edw. I. c. 34.

<sup>e</sup> Litt. sect. 36.

Co. Litt. 31.

<sup>f</sup> 1 Edw. VI. c. 12.

<sup>g</sup> 5 & 6 Edw. VI. c. 11.

of an idiot is not entitled to dower, for an idiot cannot legally marry, being incapable of giving an assent to any contract, all right in property by marriage is of course nugatory<sup>h</sup>.—There are in certain places particular customs respecting dower, which supercede the operations of the common law in that particular throughout the districts in which such customs prevail<sup>i</sup>. In some places the custom allots to the woman one-half of her husband's lands, in others the whole; in others only a quarter.—Dower, *ad ostium ecclesiæ*, or at the church door, which is where tenant in fee-simple of full age, openly, at the church door, where all marriages were formerly celebrated, endowed his wife, with the whole, or such quantity as he should please of his lands, at the same time specifying and ascertaining the same, on which the wife, after her husband's death, may enter without further ceremony.—The last kind of dower, or *ex assensu patris*, is a species of the last-mentioned, and is made when the husband's father is alive, and the son by his consent expressly given, endowes his wife with parcel of his father's lands. In either of these cases they must be made in the face of the church; and at the church porch; not on a death bed, nor in a chamber; nor in any manner that may give foundation for a suspicion of the wife's interference to obtain it. Formerly dower was held by a widow only whilst she continued a widow, and led a chaste life; but afterwards such conditions were only required in case her husband left any children. Under Henry II. the dower *ad ostium ecclesiæ*, was the most usual species; and here as well as in Normandy it was binding upon the wife, if by her consented to at the time of marriage. Neither in those days of feudal rigour, was the husband allowed to endow his wife *ad ostium ecclesiæ* with more than the third part of the lands whereof he was then seised, though he might endow her

<sup>h</sup> See page 25.

<sup>i</sup> Litt. sect. 37.

with less; lest by more liberal endowments the lord should be defrauded of his wardship and other feudal profits <sup>k</sup>. But if no specific donation was made at the church porch, then she was endowed by the common law of the third part (which was called her *dos rationabilis*) of such lands and tenements, as the husband was seised of at the time of the espousals, and no other: unless he specially engaged before the priest to endow her of her future acquisitions. And if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower in lands which he afterwards acquired <sup>l</sup>. When special endowments were made *ad ostium ecclesie*, the husband after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, and therefore in the old York ritual there is at this part of the matrimonial service the following rubrick <sup>m</sup>. *Sacerdos interroget dotem mulieris; et si terra ei in dotem detur, tunc dicatur psalmus iste, &c.* When the wife was endowed generally, the husband seems to have said, "With all my lands and tenements I thee endow," and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "With all my worldly goods (or as the Salisbury ritual has it, *with all my worldly chattel*) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which the wife acquires during coverture, out of her husband's personalty. In king John's Magna Charta, and the first charter of Henry III. A. D. 1216. c. 7. no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217 and 1224 it is particularly provided, that a widow

<sup>k</sup> Bract. l. 2. c. 39. sect. 6.  
l. 2. c. 27.

<sup>l</sup> Glanv. c. 2.

<sup>m</sup> Seld. Ux. Heb.

shall be entitled for her dower to the third part of all such lands as the husband had held in his life-time : yet in case of a specific endowment of less *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law during the reigns of Henry III. and Edward I.<sup>n</sup> In Henry IV's time it was denied to be law that a woman can be endowed of her husband's goods and chattels, and under Edward IV. Littleton lays it down expressly that a woman may be endowed *ad ostium ecclesiæ* with more than a third part ; and shall have her election after her husband's death to accept such dower, or refuse it, and betake herself to her dower at common law<sup>o</sup>. Which state of uncertainty was probably the reason that these specific dowers, *ad ostium ecclesiæ*, and *ex assensu patris* have since fallen into total disuse<sup>p</sup>. A wife by law is entitled to be endowed of all lands and tenements of which her husband was seised in fee-simple or fee-tail, at any time during the coverture ; and of which any issue, which she might have had, might by possibility have been heir<sup>q</sup>. Therefore if a man, seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands ; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife, though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed ; for no issue, that she could have, could by any possibility inherit them<sup>r</sup>. A seisin in law of the husband will be as effectual as a seisin indeed, in order to render the wife dowable ; for it is not in the wife's power to bring

<sup>n</sup> Britton, c. 101, 102. Fleta, l. 5. c. 23. sect. 11, 12.

F. N. B. 150.—41.

<sup>p</sup> Blackst. b. II. c. 8.

<sup>o</sup> Sect. 39.

<sup>q</sup> Litt. 36, 53.

<sup>r</sup> Litt. sect. 53.

the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed<sup>s</sup>. The seisin of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back to the same fine) such a seisin will not entitle the wife to dower<sup>t</sup>; for the land was merely *in transitu*, and never rested in the husband. But if the land abides in him for a single moment, it seems that the wife shall be endowed thereof. Which doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father by appearing to struggle longest; whereby he became seised of an estate by survivorship, in consequence of which seisin his widow had a verdict for her dower<sup>u</sup>. A widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus a woman shall not be endowed of a castle built for defence of the realm; nor of a common without stint; for as the heir would then have one portion of the common, and the widow another, and both without stint, the common would be doubly stocked. Copyhold estates also are not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench. But where dower is allowable, it matters not, though the husband alien the lands during the coverture; for he alienes them liable

<sup>s</sup> Co. Litt. 31.

<sup>t</sup> Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.

<sup>u</sup> Cro. Eliz. 503.



## THE PROPERTY of WOMEN.

to dower<sup>v</sup>. The old law laid many heavy exacts on a woman claiming her dower, which the more liberal laws adopted in after times have entirely done away. In ancient times a woman could not be endowed without a fine paid to the lord : neither could she marry again without his license : which privilege the lords availed themselves of to the great oppression of the woman, by either exacting from her a heavy fine if she was disposed to marry again, or compelling her to a second marriage in order to obtain their fine. To remedy such cruel grievances the charter of Henry I. and afterwards Magna Charta, made new regulations respecting widows and their dower. By the great charter<sup>w</sup> it is provided, that “ a widow after the death of her husband, “ incontinent, and without any difficulty, shall have her “ marriage and her inheritance, and shall give nothing for “ her dower, her marriage, or her inheritance, which her “ husband and she held the day of the death of her husband, “ and she shall tarry in the chief house of her husband by “ forty days after the death of her husband, within which “ days her dower shall be assigned her, (if it were not assigned her before) or that the house be a castle ; and if “ she depart from the castle, then a competent house shall “ be forthwith provided for her, in the which she may honestly dwell, until her dower be to her assigned, as it is “ aforesaid ; and she shall have in the mean time her reasonable estoves of the common ; and for her dower shall “ be assigned unto her the third part of all the lands of her “ husband, which were his during coverture, except she “ were endowed of less at the church-door. No widow “ shall be distrained to marry herself<sup>x</sup> ; nevertheless she shall “ give surety, that she shall not marry without our licence “ and assent, (if she hold of us) nor without the assent of the

<sup>v</sup> Co. Litt. 31, 32.    3 Lev. 401.    1 Jon. 315.    4 Rep. 22.    Blackst. b. II. c. 8.    <sup>w</sup> Ch. 7.    <sup>x</sup> While she chooses to live single, RUFFHEAD.

“ lord, if she hold of another.” This clause respecting dower was enforced and amended by 20 Hen. III. c. 1. which gives damages to widows deforced of their dowers. The particular lands to be held in dower must be assigned by the heir of the husband or his guardian ; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir in respect of the lands so held. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediately tenant to the heir, by a kind of subinfeudation or undertenancy, completed by this investiture or assignment : which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds ; but if it be indivisible, she must be endowed specially ; as, of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like<sup>1</sup>.

A widow may be barred of her dower, not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds or evidence of the estate from the heir, until she restores them ; and if a dowager alienes the land assigned her for dower she forfeits it, and the heir may recover it by action<sup>2</sup>. A woman also may be barred of dower by levying a fine, or suffering a recovery of lands during her coverture ; but the most usual method of barring dower is by jointures, which regulation took place A. D. 1535<sup>3</sup>. At which time the greatest part

<sup>1</sup> Co. Litt. 32, 34, 35.

<sup>2</sup> 6 Edw. I. c. 7.

<sup>3</sup> 27 Henry VIII. c. 10.

of the land in England was conveyed to uses ; the property, or possession of the soil being vested in one man, and the use or profits thereof in another ; whose directions with regard to the disposition thereof the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now though a husband had the use of lands in absolute fee-simple, yet the wife was not entitled to any dower therein, he not being seised thereof : wherefore it became usual on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in jointenancy, or jointure ; which settlement would be a provision for the wife, in case she survived her husband. At length the statute of uses ordained, that such as had the *use* of lands, should to all intents and purposes be reputed and taken to be absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure ; had not the same statute provided, that upon making such an estate in jointure on the wife before marriage, she shall be forever precluded from her dower. But then these four requisites must be punctually observed. (1.) The jointure must take effect immediately on the death of the husband. (2.) It must be for her own life at least, and not *per auter vie*, or for any term of years, or other smaller estate. (3.) It must be made to herself and no other in trust for her. (4.) It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure is made to her after marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ* ; and may either accept of it, or refuse it, and betake herself to her dower at common law ; for she was not capable of consenting to it during coverture. And if by any fraud or accident, a jointure made before marriage

marriage proves to be on a bad title, and the jointress is evicted or turned out of possession, she shall then by the provisions of the same statute, have her dower *pro tanto* at the common law <sup>b</sup>. There are some advantages attending tenants in dower that do not extend to jointresses ; and *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes ; and hers is almost the only estate, on which, when derived from the king's debtor, the king cannot distrain for his debt, if contracted during the coverture. But on the other hand a widow may enter at once on her jointure-land without any formal process ; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles ; and the resemblance was still greater while that species of dower remained in its primitive state : whereas no small trouble, and a very tedious method of proceeding is necessary to compel a legal assignment of dower. And what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow <sup>c</sup>.

If the husband is seised of a joint estate, and dies, his wife shall not be endowed : as, if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife shall not be endowed ; but it shall go to the survivor who is then in form of first feoffee or donee <sup>d</sup>. — If the husband seised of lands in fee, exchange the same for other lands with a stranger, and dies, the wife may make her election to be endowed either of those given, or those taken in exchange ; because her husband was seised of both during coverture, but she shall not have dower of both <sup>e</sup>. — If a woman be attainted of treason or felony, she shall

<sup>b</sup> 4 Rep. 1, 2.

<sup>c</sup> Co. Litt. 31, 36, 37. F. N. B. 150. Blackst.

b. II. c. 8.

<sup>d</sup> 3 Co. 27. Cro. Car. 191.

<sup>e</sup> Perk. 318.

not have her dower; but if pardoned, she shall be received to demand it, though the husband has aliened it in the mean time; because by the marriage, and seisin of her husband, she was entitled to dower; and when the impediment is removed, her capacity is again restored <sup>f</sup>. Where lands assigned to a woman for her dower, are lawfully evicted by elder title, she shall be endowed anew <sup>g</sup>. If a manor to which an advowson is appendant, descends to an heir, and he assigns dower to his mother of the third part of the manor with the appurtenances, she is thereby endowed of the third part of the advowson, and may have a third presentment <sup>h</sup>. A tenant in dower is punishable for committing waste <sup>i</sup>: and she is answerable to the remainder man at the common law by a writ of waste.—Waste is a spoil made either in houses, woods, &c. by the tenant for life or years, to the prejudice of the heir; or of him in the reversion or the remainder. If an estate for life be determined by the tenant's own act; as, by forfeiture for committing waste; or if a tenant during widowhood thinks proper to marry, in these and similar cases, the tenant having thus determined the estate by her own acts, shall not be entitled to take the emblements. But if she leases her estate to an under tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements <sup>k</sup>. A woman entitled to dower, cannot enter till it be assigned to her, and set out either by the heir, tertenants, or sheriff in certainty <sup>l</sup>. If the heir within age assign to the wife more lands than she ought to have, he himself shall have a writ of admeasurement of dower when at full age: and if the heir dies before he attain to full age, his heir shall have such writ to rectify the assignment. But the quantity of the land is only cognizable by the admeasurement; therefore no such writ lies with the

<sup>f</sup> Co. Litt. 33. 13 Co. 23.

<sup>i</sup> 4 Leon. 239. Keilw. 84.

<sup>g</sup> Perk. 491.

<sup>k</sup> Co. Litt. 55.

<sup>h</sup> Watf. c. 9

<sup>l</sup> 1 Rolls. Ab. 68.

heir when he attains to full age, on account of the widow's having improved the lands after assignment, or if they are rendered of greater value by reason of mines, open at the time of assignment<sup>m</sup>.

### *Deforcement for Dower.*

**I**F a man marries a woman, and during the coverture is seised of lands which he alienes, and dies; or is disseised and dies; or dies in possession, and the alienee, disseisor, or heir, enters on the tenements, and doth not assign the widow her dower, this is called a deforcement; and is a species of injury by ouster or privation of a freehold. It means that the tenant or possessor had originally a right to enter upon it, but his detainer is unlawful. Deforcements may arise also upon breach of a condition in law; as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required; but continues to hold the lands; this is such a fraud on the man's part, that the law will not allow it to divest the woman's right, though it does divest the possession, and thereby becomes a deforcement. The remedy for such an injury is, the restitution or delivery of the possession to the right owner; and in some cases damages for the unjust amotion. And it may be obtained by a formal but peaceable entry made by the legal owner. Or it may be done by a writ of dower *unde nihil habet*. But if she be deforced of only part of her dower, she cannot then say that *nihil habet*; and therefore she may have recourse to another action by writ, the writ of dower, which is a more general remedy extending either to part or to the whole. If the widow is deprived of her dower by a recovery had against her through her default, or non-appearance in a possessory action, they were entirely without

<sup>m</sup> F. N. B. 148, 149.

remedy at the common law, but by statute a new writ is allowed for such persons, after their lands have been so recovered against them by default, called a *quod si deforcat*<sup>n</sup>. —One of the few exceptions which our law admits to the trial by jury is, when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this being looked upon as a dilatory plea, is in favour of the widow, and for greater expedition is allowed to be tried by witnesses examined before the judges<sup>o</sup>. —Sir Thomas Arundell being attainted of felony, and his wife's dower saved by act of parliament, she brought her writ of dower against the earl of Pembroke, and he making default after appearance, a termor prays to be received, and shews his lease after the coverture, and the attainder, and that Edward the sixth granted a commission under the seal of the court of augmentations to assign a third part of the land of the said Sir Thomas Arundel to his wife in dower; and shews further that by virtue of the commission, the third part of the rent reserved on the said lease was assigned to her, and this assignment confirmed to her by letters patent under the great seal, and shews her agreement and acceptance thereof, and said, that this suit was by collusion to defraud him of his term. And in this case it was held, first, that the court of augmentations had no power to assign dower to the demandant, or any other woman, but it must be in Chancery. Secondly, that the assignment of the rent was not warranted by the commission, and then the confirmation could not make that good which was merely void, and it was adjudged for the demandant<sup>p</sup>. If a Jew, born in England, marries a Jew who is likewise born here, and the husband is converted to the christian faith, and afterwards purchases lands, and enfeoffeth the other and dies, the wife shall not have dower. For Richard the

<sup>n</sup> West. 2. 13 Ed. I. c. 4.

<sup>o</sup> F. N. B. 147.

<sup>p</sup> Dyer, 363.

<sup>2</sup> Mod. 18.

first erected a court, where all the real and personal estates of the Jews were registered, and upon the death of any Jew such estate came to the king, though it was redeemable by their children paying a fine, and in this court she could not demand dower but against a Jew; and she could not demand it at common law against a christian. And therefore if the husband had not aliened, yet she could not recover against the heir of a christian<sup>9</sup>.

### *Rights of Widows.*

**I**F husband and wife have a decree for money in right of the wife, if the husband dies before the receipt thereof, the benefit of the decree belongs to the wife<sup>r</sup>. If lands are given to the husband and wife, and to the heirs of the husband, who dies, the wife may disagree to this estate made during the coverture; and then it will be an estate to the husband, and his estate *ab initio*, and so she shall have her dower thereof. But if the estate be made to the husband and wife, for the life of the husband, remainder to the right heirs of the husband, it should seem she cannot in that case disagree, because the estate upon the husband's death is determined and gone<sup>s</sup>. If an husband seised in right of his wife of lands in fee, aliens them, and dies, leaving his wife and issue: if the widow during her life does not bring the writ of *cui in vita*, for the recovery of her own lands, after her decease her heir may have a writ of *sur cui in vita* against the tenant. — Where the husband lends money in the name of himself and his wife upon mortgage and bonds, and dies, it has been ruled in Chancery, that the wife is entitled to the money by survivorship if there be assets sufficient to pay the husband's debts<sup>t</sup>. If an estate be granted to a wo-

<sup>9</sup> Co. Litt. 31.    <sup>3</sup> Hollingsh. 15.  
<sup>t</sup> 2 Vern. 633.

<sup>r</sup> 1 Chan. Ca. 27.

<sup>s</sup> Peck. 352.



man for life, or during her widowhood ; and she marries, such estate is forfeited. But whilst she continues unmarried, such tenure is considered as an inheritance for life. Grants of estates for life, are generally made expressly for the term of a man's *natural* life ; in order to prevent the grant determining by a civil death : as, if an estate be granted to a woman for her life, and she enter into a monastery, she is by that act dead in law.—If a woman being a lunatic kills her husband, or any other, yet she shall be endowed, because these cannot be treason, or felony in her who was deprived of her understanding by the act of God <sup>u</sup>.—Where a man bequeaths to his wife the residue of his goods, and appoints her executrix to pay his debts, and dies ; if she pays his debts and marries a husband who dies possessed of such residue, and appoints an executor, such residue shall go to the wife and not to the executor of the husband, if he did not make a gift of it in his life time <sup>v</sup>. The widow of a man seised of an advowson, shall have the third presentation, the heir having the two first, which right cannot be taken from her by grant made by the husband in his life time of the third turn ; for in a proper action she may recover the third presentation as her dower ; or it may be assigned to her for dower. But without such recovery or assignment, the wife cannot make title to the advowson, or to any presentation, no more than she can enter by her own authority into any other lands or tenements to which she hath right of dower <sup>w</sup>.—An husband seised of a manor in right of his wife, letting a copyhold parcel thereof for years by indenture, and dying, the wife may demise such lands by copy, as before such lease <sup>x</sup>.—A copyholder in fee where the custom was for a widow's estate, made a lease by license, reserving rent to him and his wife during their lives, omitting to say, and either

<sup>u</sup> Perk. 364.<sup>v</sup> Dyer, 321.<sup>w</sup> Watf. c. 9.<sup>x</sup> Cro. Eliz. 459.

of them. But the court decreed that the wife should have the rent after the death of her husband, though no party to the lease <sup>y</sup>.—The husband seised in right of his wife cannot grant copies in his own name, but ought to join the wife with him <sup>z</sup>. Where a husband departs from his wife and she is ignorant of what is fallen to him, and his friends give out that he is dead, and the wife is prevailed on to release all marriage and interest in him as an husband, and afterwards by the persuasion of the friends of the husband she marry another man who dies, she still having no notice of her former husband being alive, though such first husband be not out of the realm, she shall not by such conduct lose her dower by her first husband on his death <sup>a</sup>.—The wife of a *felo de se* shall have dower; so likewise if the husband be outlawed in trespass, or any civil action; for these work no corruption of blood, or forfeiture of lands <sup>b</sup>.—A king's tenant seised of lands in fee, or fee tail, at the day of his death, which he held of the king in chief; the widow coming into the chancery, and there making oath that she will not marry without the king's leave, obtains a writ of *dota assignando*. These widows are called the king's widows <sup>c</sup>.

*Customs respecting the Endowment of Widows.*

A Widow shall not be endowed of copyhold lands unless by special custom of the manor <sup>d</sup>. Where it is a custom in a manor that the wife of a copyholder for life shall hold the copyhold during her widowhood, it is a good custom. So likewise if a copyholder in fee marries, and the wife survives, she shall have the fee, and *vice versa* <sup>e</sup>.—There can be no dower or tenancy by the custom of a copyhold

<sup>y</sup> 1 Vent. 163.

<sup>1</sup> Roll Abr. 680.

<sup>a</sup> Hob. 216.

<sup>z</sup> Cro. Jac. 99.

<sup>b</sup> Plow. 261.

<sup>c</sup> Noy 2. B & F. 252.

<sup>a</sup> Case of Green and Hervey,

<sup>c</sup> Staundf. Prærog. cap. 4.

without special customs <sup>f</sup>.—The widow of *cestui que trust* of a copyhold estate ought to have her free-bench as well as if the husband had the legal estate in him <sup>g</sup>.—The custom of a manor was, that the wife of a copyholder dying seised shall have her widows estate: a commission of bankruptcy is taken out against the copyholder, and his estate sold, but before the vendee was admitted, the copyholder dies; and yet it was adjudged that the widow's estate was gone, because her husband did not die seised; his estate and right being bound by the sale, to which the admittance after has relation, and divests the widow's estate <sup>h</sup>.—If there be a custom that where the husband sells his lands, and his wife receives part of the money, or it be expended in the family, that his wife shall be barred of her dower, this may be good.—If the custom of a manor be, that if any of the tenants marry a widow, she shall have no dower, this is good. But the custom that a wife of a tenant in fee shall not be endowed, is not good <sup>i</sup>.—A wife cannot avoid a lease for years made by her husband of copyhold lands, in order to be endowed thereby, unless there be a special custom to authorise her <sup>k</sup>.

### *Of Jointures.*

THE origin of jointures has been already seen under the article of dower, and their nature has been likewise shewn <sup>l</sup>; it may however be proper here to say something more particularly concerning them. No estate, as was before observed, can be granted by the husband to the wife in bar of dower, that does not take effect immediately on the death of the husband: neither shall a feoffment in fee to the use of himself for life, after to the use of B for his life, and after to

<sup>f</sup> Noy, 29.  
Abr. 562.

<sup>g</sup> 2 Vern. 585.  
<sup>k</sup> Cro. Jac. 36.

<sup>h</sup> Cro. Car. 569.  
<sup>i</sup> See page 192.

<sup>i</sup> 2 Roll.

the use of the wife for her jointure be good, although B dies before the husband: for the death of B was an event subsequent to the making of the jointure, and an uncertain contingency<sup>1</sup>. A jointure must be an estate to the wife for life, and conditions that are within the act of the wife may be made therein; and if the wife after the death of her husband accepts such jointure, she is bound to the condition of it. So if it be made to her whilst she continue a widow, it is a good jointure within the act. But if an husband jointure an estate to his wife *per autre vie*, this is not within the act, for it may determine during her life, without any default in her<sup>m</sup>. A covenant to release demands to the wife's guardian or father after marriage is void<sup>n</sup>. If a jointure be made to a wife before coverture, after the death of the husband the wife may not waive it, and take her dower, as she may do by a jointure made during the coverture, and if lands are conveyed to a woman before marriage for part of her jointure, and after marriage more land is conveyed to her for her full jointure, and in satisfaction of all her dower, and after the husband dies; in this case if the woman waives the land conveyed to her use after marriage, she shall have the land conveyed to her before coverture, and her dower also in the residue for land conveyed to the wife for part of her jointure, or in satisfaction for part of her dower, is no bar of any dower; but she must waive it before she enter upon her jointure. Acceptance of dower by deed indented shall conclude the right of the wife<sup>o</sup>.—If an husband covenant to his wife that her jointure shall be of a certain yearly value, and it fall short thereof, though her estate be without impeachment of waste, yet she may commit waste, so far as to make up the deficiency of the jointure<sup>p</sup>.—A man made a fet-

<sup>1</sup> Sid. 34.<sup>m</sup> 4 Co. 3.<sup>n</sup> Salk. 158.<sup>o</sup> Bar. & Fem. 166.<sup>p</sup> Case of Carew and Carew, M. 1698.

tlement on his eldest son for life, with remainder to his first and other sons in tail, remainder over, with power for his son to appoint any of the lands not exceeding one hundred pounds per annum to any wife he should afterwards marry, for a jointure (the father being under an apprehension that he was then married to one whom as he disliked he did not mean his son should so provide for); the father died, and the son married that woman, though there was strong presumptive proof that he was married to her before; and after marriage he appointed certain lands to trustees, in trust for her jointure, and covenanted that if they were not of an hundred pounds per annum value, that upon request made to him any time during his life, he would make them up so much out of other lands in his power; he lived for several years, and no complaint was made that the lands were not of that value, nor request to make it up, and died without issue. On a bill brought by the widow to have the jointure made up the annual value specified, the lord keeper said, that a provision for a wife or children, was not to be considered as a voluntary covenant; and therefore decreed the deficiency to be made up notwithstanding the circumstances of the case, and her neglect in not requesting it during coverture, for the laches of a feme-covert cannot be imputed to her<sup>q</sup>.—If the heir brings a bill against a jointress to discover deeds and writings, he is not entitled to sue them unless he confirms the wife's jointure, though it be made after marriage<sup>r</sup>.

A private act of parliament is sometimes procured to enable the tenant of an estate to make a jointure for a wife; or to secure an estate against the claims of infants, or other persons under legal disabilities. For it sometimes happens

<sup>q</sup> Fothergill and Fothergill, H. 1701. Bar. & Fem. 167.

<sup>r</sup> 1 Vern.

that by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power, in which case the legislature alone can afford him redress.—If a man be found guilty of high treason, he forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail ; and all his rights of entry on lands and tenements which he held at the time of the offence committed, or at any time afterwards, to be forever vested in the crown ; and from the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backward, to the time of the treason committed, so as to avoid all intermediate sales and incumbrances, but not those before the fact, therefore a wife's jointure is not forfeited by the treason of her husband, if it was settled upon her before the treason was committed, but her dower is expressly forfeited by statute. And, if the wife be attainted of treason the husband shall be tenant by the curtesy of the wife's lands : but these forfeitures do not take effect unless an attainder be had ; so that if a traitor dies before judgment is pronounced ; or is killed in open rebellion ; or is hanged by martial law, his lands are not liable to forfeiture, he never having been attainted of treason †.

*Assignments made by Widows.*

**I**F a mother having a right to dower, to encourage a marriage of her son, releases her dower, and the release is shewn to the wife, and her relations, it shall bind the mother though the lease was obtained by a fraudulent suggestion<sup>u</sup>.—A widow before her marriage with a second husband assigning over the greatest part of her estate to trustees, for the

<sup>u</sup> 5 & 6 Edw. VI. c. 11.

<sup>u</sup> 1 Vern. 19.

† Co. Litt. 13. 3 Inst. 211. 1 H. P. C. 359.

benefit of children by her former husband, without the privity of such second husband, has been thought by the court to be a justifiable act, and that she might thus provide for her children before she put herself under the power of a husband. And where it was proved that eight thousand pounds had been thus settled, and that the husband had suppressed the deed, he was directed to pay the whole money without directing any account<sup>v</sup>. But if a widow makes a deed of settlement of her estate, and marries a second husband, who was not privy to such settlement, and it appearing to the court, that it was in consideration of her having such estate that the husband married her, the court will set aside such deed as fraudulent<sup>w</sup>.

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## C H A P. IX.

*Of local Customs.*

**N**Otwithstanding the Norman conquest subverted the Saxon laws and customs, and introduced the feudal system in their stead, yet there still remains in several parts of the kingdom traces of the Saxon regulations respecting inheritances and possession of lands. Tenure in burgage seems to have been derived from so remote an original as the times of the Saxons. One of the most remarkable customs peculiar to tenements so held in ancient language, is called *borough English*, which gives the inheritance to the youngest

<sup>v</sup> 1 Vern. 408<sup>w</sup> 2 Chan. Rep. 81.

son, and so in an inverted succession up to the eldest. And by the same tenure, the widow is endowed of all her husband's tenements instead of the third part, which she was entitled to by the established laws of descent founded on the common law <sup>x</sup>. This is called her free bench. The reason of which seems to be, that in these boroughs the eldest sons were introduced into the trade of their father, and therefore being provided for out of their father's goods in his life-time, were able to subsist of themselves without any provision in land; and therefore the lands descend to the youngest son, he being in most danger of being left destitute, and consequently the wife who was entrusted with the care of the younger children, had the whole during her life <sup>y</sup>. Another reason has been assigned for this extraordinary custom, which has been spoken of in the first chapter of this second book <sup>z</sup>.

By the custom of gavelkind tenure, which is perhaps coeval with burgage tenure, the wife shall have a moiety of the lands so long as she keeps herself chaste and unmarried. And the reason of this provision for the wife seems to be founded on the equal distribution which is observed in these kind of inheritances in the same family, for their mutual support; and therefore when she proves unchaste or marries again, and thereby contracts a new alliance, this provision as to her ceases, and returns again into the family. But the presumption of her chastity is to continue till it be proved that she was delivered of a child begotten during her widowhood <sup>a</sup>.

<sup>x</sup> Seld. tit of hon. 2. 1. 47. Reg. Mag. 1. 4. c. 31.  
 Noy, 106. Roll. Abr. 558. Bro. tit. Dower, 70.  
<sup>a</sup> F. N. B. 150. Co. Litt. 33.

<sup>y</sup> Litt. sect. 165.  
<sup>z</sup> Page 110.



## C H A P. X.

*Of the Doctrine of last Wills and Testaments.**Of the Power to make Wills and Testaments, or to bequeath real and personal Estates.*

**E**VERY person may make a will that is not under some special prohibition by law or custom. Which may arise either from want of sufficient discretion; by which infants under the age of fourteen, if males, or twelve, if females, are rendered incapable of making a testament<sup>b</sup>; and no real estate can be conveyed by will, the testator being within the age of twenty-one years<sup>c</sup>. Likewise madmen, idiots, or natural fools, persons become childish through age or sickness; drunkards whilst in a state of inebriety, nor until their senses are sufficiently restored, and all such as are born deaf, dumb, and blind.—Those who are born deaf and dumb, cannot make any kind of testament, or last will, unless it appears by unquestionable evidence, that such an one understands the meaning of a will, and that he has a desire to make one; for if he has such understanding and desire, he may by signs and tokens, declare his testament<sup>d</sup>. Blind persons may make a nuncupative will before a sufficient number of witnesses, or they may make a written will, provided it is read before witnesses, and in their presence acknowledged by the testator for his last will. But a writing delivered to the testator, and he without hearing it read acknowledging it for his will, will not be sufficient, as the

<sup>b</sup> Case of Hyde and Hyde, 8 Ann, Gilb. R. 74.<sup>c</sup> 24 & 35 Hen. VIII.<sup>d</sup> 5. sect. 14.<sup>e</sup> Sw. 95.

probability of a counterfeit testament being thereby obtruded upon him is very strong. And the same precautions are requisite for authenticating the will of a person who cannot read. For though the law generally presumes, that a person who executes a will, knows and approves the contents thereof, yet that presumption ceases where by defect of education he cannot read, or by sickness he is incapable of reading his will at the time of executing it <sup>e</sup>.—If madmen or lunatics have clear or calm intermissions, then during such intervals of reason they may make their testaments <sup>f</sup>. Swinburn describes an idiot to be one, who notwithstanding he be of lawful age, yet is so witly, that he cannot name to twenty, nor can tell what age he is of, or knows who is his father or mother; or is able to answer any question of equal plainness; from whence it is evident, he is not endowed with reason to discern what is to his profit or detriment <sup>g</sup>. But it is not held to be sufficient, that the testator is of memory when he makes his will to answer to familiar and useful questions; but he ought to have a disposing memory, so as to make disposition of his estate with understanding and reason; and this is such memory as the law calls sound and perfect <sup>h</sup>.

Likewise want of sufficient liberty or free-will, render persons incapable of bequeathing their substance. Therefore prisoners and captives making a testament, the judge of the court is to determine in his discretion concerning the validity thereof, from the evidence laid before him, of the particular circumstances of duress; and whether such persons can be supposed to have had a free-will of their own in bequeathing. For the same reason feme-coverts cannot make a will but in a very restrained manner, as has been already shewn <sup>i</sup>. The

<sup>e</sup> Burn, E. L. art. Wills.      <sup>f</sup> Swinb. 76.      <sup>g</sup> Ib. 79.      <sup>h</sup> Case of the Marquis of Winchester, T. 41 Eliz. 6 Co. 23.      <sup>i</sup> 34 & 35 Hen. VIII. c. 5. See page 178.

fear of death, or of bodily hurt, or of the loss of all or the greatest part of our goods, or the like, are sufficient to vacate a testament. In all such cases the judge is to consider not only the quality of the threatenings, but also the persons as well threatening as threatened. In the threatener, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like; but if the testator afterwards, when there is no cause of fear, ratifies and confirms the testament so executed, it seems to be good in law<sup>k</sup>. So likewise if a man makes a will in his sickness, at the importunity of his wife, that he may enjoy quiet in his last moments, such will be held to be a will made by restraint, and shall not be good<sup>l</sup>.—The third and last bar to bequeathing arises from criminal conduct; therefore all traitors and felons from the time of conviction cannot make a testament; and a *felo de se* cannot bequeath his personal estate; but he may make a devise of his real estate, for that is not subject to any forfeiture as his goods and personals are. Outlaws, though it be for debt, cannot make a testament so long as such outlawry continues; but if their executors reverse the outlawry, the will is established<sup>m</sup>. A person excommunicated may make a testament, unless that great curse, which is called anathema, is pronounced against him, which the spiritual court does not inflict but for flagrant offences. And this it should seem incapacitates a person from making a will until it is removed<sup>n</sup>.

### *Of written Wills.*

**I**T may be proper to observe here, for the sake of precision merely, that strictly speaking, the terms *testament* and *will*, are not synonymous; the former being a devise of chattels or personal effects, the latter limited to land. The

<sup>k</sup> Swinb. 475. 6.

<sup>l</sup> Styl. 427.

<sup>m</sup> See page 62.

<sup>n</sup> Swinb. 109.

first requires executors, which the latter does not. But as will and testament are used indifferently by the best writers, the distinction is too refined to be adopted in this work.

While property continued only for life, testaments were useless and unknown; and when it became inheritable, the inheritance was long indefeasible; and the children or heirs at law could not be set aside by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by testament, that is, by written or oral instructions properly witnessed, and authenticated, according to the pleasure of the deceased; which we therefore emphatically style his will. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one third of his moveables from his wife and children. And in general no will was permitted of lands till the reign of Henry the Eighth, and then only of a certain portion; for it was not till after the restoration, that the power of devising real property became so universal as at present °.

A testament of chattels, or of personal effects, written in the testator's own hand, though it hath neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is the testator's hand writing °. And though written in another man's hand, and never signed by the testator, yet if it be

° Blackst. b. II. c. 1.

° Godolp. p. 1, c. 21. Gilb. Rep. 260.

proved to be according to his instructions, and approved by him, such hath been held a good testament of personal estate<sup>9</sup>. Yet it is safer and more prudent, to have it signed and sealed by the testator, and published in the presence of witnesses.—A will of a real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet it was held a good will for the personal estate; and though more was intended to be done, yet it was decreed to be good for what was done<sup>1</sup>. And where a person intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil; and though it had no conclusion, but appeared to be a draft which he intended afterwards to finish; for it was not signed, but had at the end a calculation of his effects, and an order to pay a dividend of stocks, yet it was held to be a will<sup>2</sup>. So in a case where the testator gave instructions to make his will of his real and personal estate, and when it was brought to him, he made several alterations, and then wrote the whole over as altered with his own hand; this being found in his study, though not signed or sealed, was held by the delegates to be a good will, as to the personal estate; on an appeal from the consistory court, in which it was decreed that the deceased died intestate<sup>3</sup>. If a testament is made in writing, and afterwards lost by some casualty, yet if there are two witnesses who saw and read the written testament, and remember the contents thereof, such two witnesses so deposing concerning the tenor of the will, are sufficient for the proof in form of law to pass personal property. But it is necessary hereto, that not only their integrity, but likewise their judgment and precision are unquestionable; and even then their testimony must be corroborated by concurring circum-

<sup>9</sup> Comyns, 452.<sup>1</sup> Case of Brown and Heath, 1721. Comyns, 453.<sup>2</sup> Ibid. Case of Loveday and Claridge, 1730.<sup>3</sup> Ib.

stances ; for the law, as lord Coke expresses it, considers the intention of the testator as the pole star which is to direct the judge in the exposition of wills.

Testaments may be avoided three ways. (1.) If made by a person labouring under any of the incapacities beforementioned. (2.) By making another testament of a later date ; and (3.) By cancelling or revoking it. For though I make a last will and testament in the strongest words, yet I am at liberty to revoke it, because my own act or words cannot alter the disposition of law, so as to make that irrevocable, which is in its own nature revocable <sup>u</sup>. For this saith lord Bacon would be for a man to deprive himself of that which of all other things is most incident to human condition ; and that is alteration or repentance <sup>v</sup>. It hath also been held, that without an express revocation, if a man who hath made his will afterwards marries, and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy <sup>w</sup>. The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by, without assigning a true and sufficient reason, any of the children of the testator <sup>x</sup>. But if the child has any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed, but was then supposed to have acted thus for some substantial cause, and in such case no *querela inofficiosa testamenti* was allowed. Hence probably has arisen that groundless vulgar error of the necessity of leaving the heir a shilling, or some other express legacy, in order to disinherit him effectually ; whereas the law of England makes no such wild suppositions of forgetfulness or insanity ; and therefore though the

<sup>u</sup> 8 Rep. 52.

<sup>v</sup> Elem. c. 19.

<sup>w</sup> L. Raym. 448. 1 P. W. 394.

See pages 179, 180.

<sup>x</sup> Inst. 18. 1.

heir or next of kin be totally omitted, it admits no *querela inofficiosa*, to set aside such a testament.

*Of the Father's Right to bequeath his Property.*

**W**ITH us, testaments are of very high antiquity. Before the conquest we find the method of bequeathing personal estates by will prevail generally. “If any one, either through carelessness, or being surprized by sudden death, dies intestate, the lord shall claim to himself only his own part, which devolves to him by law under the denomination of an heriot; but the estate shall be distributed to the wife, children, and nearest of kin in their respective rights<sup>y</sup>.” But a man had originally no right of bequeathing the whole of his personal estate: for by the common law as it stood in the twelfth century, a man's goods were to be divided into three equal parts; of which one went to his heirs, or lineal descendants: another to his wife: and the third only was at his own disposal. Or if he died without a wife he might then dispose of one moiety; and the other went to his children. So *vice versa*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonarum*, was given to recover them<sup>z</sup>. This continued to be the law of the land until the time of Magna Charta, which requires that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executors to perform the will of the deceased. And if nothing be owing to the crown, all the chattels shall go to the use of the dead, saving to his wife and children their reasonable parts<sup>a</sup>; and

<sup>y</sup> E. L. Canut. c. 68.

<sup>z</sup> F. N. B. 122. Blackst. b. II. c. 32.

<sup>a</sup> 9 Hen. III. c. 18.

even in the fourteenth century this right of the wife and children was held to be universal or common law. However, it must be owned that these restraints on a man's bequeathing his effects were frequently pleaded as the local custom of Berks, Devon, and other counties ; but Sir Edward Finch lays it down expressly but a little more than a century ago <sup>b</sup>, to be the general law of the land ; but this law is at present altered by imperceptible degrees, and a man may now by will bequeath the whole of his goods or chattels, though we cannot trace out when first this alteration began.—A widow brought an action of detinue against her husband's executors, because by the established usage of the whole kingdom a wife was entitled to her *reasonable part* of her husband's effects ; and it was further set out in the declaration, specifying what portion the widow at common law was considered as entitled to, viz. one moiety, if the husband left no children ; and a third part, if he left children. She stated further, that her husband died worth 200,000 marks, without issue had between them ; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband dying without issue was denied ; but the rule of law as stated in the writ seems to have been universally allowed <sup>c</sup>. Indeed Sir Edward Coke is of opinion that this never was the general law, but only obtained in particular places by special custom <sup>d</sup> : and to establish that doctrine he relies on a passage in Bracton, which he seems to have mistaken <sup>e</sup>. And Glanvil, Magna Charta, Fleta, the Year-books, Fitzherbert and Finch, all agree with Bracton, that this right to the *pars rationabilis* was founded in the common law. And to this day it is the law of Scotland <sup>f</sup>. And this ancient regulation continued in force in the province of York, the principality of Wales, and the

<sup>b</sup> In the Reign of Charles I.

<sup>c</sup> M. 30 Edw. III. 25.

<sup>d</sup> 2 Inst. 33.

<sup>e</sup> L. 2. c. 26. sect. 2.

<sup>f</sup> Dalrym. Feud. prop. 146.



city of London, till very modern times ; when in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, four statutes have been provided. The first of these acts respects the province of York<sup>s</sup>, and gives the husband full power of disposing by will of all his effects, without restraint or reserve from either his wife, or issue. Freemen, however, of the cities of York and Chester are excepted, and bound by the former local custom. But a subsequent act put the two cities on the same footing with the rest of the province of York<sup>h</sup>. By another act passed three years after the first above recited<sup>i</sup>, (A. D. 1606.) the principality of Wales was put on the same footing, though in a more equitable manner than in the former : for it enacts that the act shall not extend to take away any right or title which any woman then married, or young children then born, might have to the *reasonable part* of their husband's or father's effects, by virtue or colour of the said usage and custom. A clause highly equitable, and the former act by subjecting the woman then married, and the children then born ; or that might hereafter be born of a marriage then had, to the discretionary bequest of their husbands and fathers, gave it the complexion of an *ex post facto* law. The like distributive justice to women at that time married, and their issue, was shewn by an act passed in 1724<sup>k</sup>, which destroyed the custom then prevailing in London, by which the widow of a freeman, and his children, were equally entitled to one-third of his effects : but by this act all freemen of London have a right granted them of disposing of all their personal estates by will ; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may

<sup>s</sup> 4 W. & M. c. 2.

<sup>h</sup> 2 & 3 Ann. c. 5.

<sup>i</sup> 7 & 8 W. c. 2.

<sup>k</sup> 11 Geo. c. 18.

devise the whole of his chattels as freely as he formerly could his third part, or moiety. But the personal estate of a freeman of London dying intestate is subject to be distributed according to the former custom of the city. Or any engagement in writing in consideration of marriage, purporting that his personal estate at his death shall be distributed according to the custom of the city of London, shall barr his right of bequeathing it away by will <sup>1</sup>.

*Devises of real Estates.*

“IT seems sufficiently clear,” says judge Blackstone, “that before the conquest lands were deviseable by will <sup>m</sup>. But upon the introduction of the military tenures, the restraints of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint, which we may trace even from the ancient Germans <sup>n</sup>, was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this it is alledged maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours: since it rarely happens, that the same man is heir to many others, though by art and management he may frequently become their devisee.” No estate greater than for term of years could be disposed of by testament according to the common law of England since the conquest, except only in Kent, and in some ancient boroughs, and a few particular manors, where their Saxon immunities by special indulgence subsisted <sup>p</sup>. And though the feudal re-

<sup>1</sup> Co. Litt. 112. See page 191.

<sup>m</sup> Wright of tenures.

<sup>n</sup> Tacit.

de Mor. Germ. c. 21.

<sup>o</sup> Comment., b. II. c. 23.

<sup>p</sup> Litt. sect. 167.

<sup>q</sup> Inst. 111.

straint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity, and imposition on the testator *in extremis*, which made such devises suspicious. Besides in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer, and new acquisition of property. But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. For as the Popish clergy then generally sat in the court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer, and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But when the statute of uses, 27 Hen. VIII. had annexed the possession to the use, these uses being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, 32 Hen. VIII. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all persons being seized in fee-simple, (except feme-coverts, infants, ideots, and persons of non-sane memory) might by will and testament in writing devise to any other person, but not to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in soccage: which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements<sup>9</sup>.

<sup>9</sup> Blackst. b. II. c. 23.

And so favourable were the courts of law towards devises of lands after they were rendered legal by the statute, that bare notes in the hand-writing of another person, and only signed by the testator, were allowed to be good wills within the statute<sup>r</sup>. And the latitude thus given to testators was soon perverted to answer the most fraudulent purposes, by forgery and subornation. To remedy which an act passed in 1676, commonly known by the title of the statute of frauds and perjuries<sup>s</sup>, which directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction, and be subscribed in his presence by three or four credible witnesses; and such will shall remain in force until it be burnt, cancelled, torn, or obliterated by the testator, or by his directions, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same. In the construction of which statute, it has been adjudged that the testator's name, written with his own hand at the beginning of the will, as "I John Mills do make this my last will and testament," is a sufficient signing, without any name at the bottom; though the other is the safer way. It has also been determined that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times<sup>t</sup>. But they must all subscribe their names as witnesses in his presence, lest by any possibility they should mistake the instrument<sup>u</sup>. And in a case determined about twenty-five years ago<sup>v</sup>, the judges were extremely strict in regard to the credibility, or rather competency of the witnesses: for they would not allow any legatee, nor by consequence a

<sup>r</sup> Dyer, 72. Cro. Eliz. 100.

<sup>s</sup> 29 Car. II. c. 3.

<sup>t</sup> 3 Lev. 1.

<sup>u</sup> Freem. 486. 2 Ch. Cas. 190. Pr. Ch. 185.

<sup>v</sup> 1 P. W. 740.

creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for if it were established he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets<sup>w</sup>. This determination however alarmed many purchasers and creditors, and threatened to shake many of the titles in the kingdom that depended on devises by will. For if a will was attested by a servant to whom wages were due, by the apothecary, or attorney, whose very attendance made them creditors, or by the minister of the parish who had any demand for tythes or ecclesiastical dues, and such persons are most likely to be present in the testator's last illness, and if in any such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, as far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6. which restored both the competency and credit of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of private interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit as well as that of all other witnesses to be considered on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a cause in the court of King's Bench before lord Mansfield, the testimony of three witnesses who were creditors was held to be sufficiently credible, though the land was charged with the payment of debts, and the reasons on which the former determination were founded were judged to be insufficient<sup>x</sup>. By the method of conveying real estates

<sup>w</sup> Stat. 1253.

<sup>x</sup> Wyndham and Chetwynd, M. 31 Geo. II.

by devise, creditors by bond, and other specialties, which affected the heir provided he had assets by descent, were defrauded of their securities, not having the same remedy against the devisee of their debtor. To remove this species of injustice, the statute 3 and 4 W. and M. c. 14. provided that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, shall, as against such creditors only, be deemed to be fraudulent and void : and that such creditors may maintain their action jointly, both against the heir and the devisee.

A will of lands made by the permission and under the control of these statutes is considered by the courts of law, not so much in the nature of a testament, as of a conveyance declaring the uses to which the lands shall be subject : with this difference, that in other conveyances the actual subscription of the witnesses is not required by law, though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead ; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels ; that the latter will operate upon whatever the testator dies possessed of, the former upon only such real estates as were his at the time of executing and publishing his will <sup>y</sup>, wherefore no after-purchased lands will pass under such devise, unless subsequent to the purchase or contract, the devisor re-publishes his will <sup>z</sup>.

<sup>y</sup> 1 P. W. 575.

<sup>z</sup> 1 Ch. Cas. 39. 2—144. Salk. 238. Blackst.

II. 23.

If the testator shewing the will to the witnesses, informs them that it is his last will and testament ; or, herein is contained my last will, or words to the same purpose, it is sufficient, without making the witnesses privy to the contents of it, provided they are able to prove the identity of the writing ; or that what is produced after the testator's death is the very same writing which he in his life-time affirmed before them to be his will<sup>a</sup>. And where the witnesses were deceived by the testator at the time of the executions, and were bound to believe from the words he made use of at the execution of the instrument, that it was a deed and not a will, it being delivered as his act and deed, and the words "sealed and delivered" were put above the place where the witnesses were to subscribe their names, it was adjudged by the court to be a good will ; because inconveniencies might arise in families from having it known that a person had made his will.

Notwithstanding all testamentary devises are interpreted in the most favourable manner for the devisee, yet where the words of the will are so general and uncertain, that the testator's meaning cannot be collected from them, they are void. As, where a man by will gave *all* to his mother, the general words were held to convey no lands to his mother : for since the heir at law had a plain uncontroverted title, unless the ancestor disinherited him, it would be severe and unreasonable to set him aside, unless such intention of the testator is evident from the will ; for it were to set up and prefer a dark, and at best but a doubtful title, to a clear and certain one<sup>b</sup>.

<sup>a</sup> Swinb. 53. God, O. L. 66.

<sup>b</sup> 2 Ba. Ab. 81. Gilb. Rep. 112.

*Of Nuncupative Wills.*

**T**HIS kind of will depends merely upon oral evidence,

being declared by the testator *in extremis* before a sufficient number of witnesses, and at that time or afterwards, reduced to writing, and read over to him and approved; and this transaction must be attested by the oaths of three credible witnesses at the least; and if the estate so bequeathed exceeds the value of 30*l.* it is further required, that the testator himself shall especially call upon such witnesses to attest the same; and it must be made in his last sickness; in his own habitation, or dwelling house; or where he had been previously resident ten day at least; except he be surprized with sickness on a journey or from home, and dies without returning to his dwelling. And the witnesses to such nuncupative will shall not be allowed to prove the same after six months from the making thereof, unless it were put in writing within six days, neither can it be admitted to be proved until fourteen days after the decease of the testator, nor till process has first issued to call in the widow or next of kin to contest it if they think proper<sup>c</sup>. Further, the testamentary words shall be spoken with an intent to bequeath, not any loose idle discourse in his last illness; for he must require the bye-standers to bear witness of such his intention; it must be his last sickness; for if he recovers, he may alter his disposition, and has time to make a written will: It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily, nor without notice, lest the family of the testator should

<sup>c</sup> 29 Car. II. c. 3. 4 and 5 Ann, c. 16.



be put to inconvenience, or be surprized <sup>e</sup>. A blind man, it has been already observed, may make a nuncupative will; by declaring it before a sufficient number of witnesses to be his will <sup>e</sup>.

### *Of a Codicil.*

A Codicil is a supplement to a will; or an addition made by the testator annexed to, and to be taken as part of a testament; being for its explanation or alteration; or to make some addition to, or subtraction from the former dispositions of the testator <sup>f</sup>. And these likewise are allowed to be nuncupative if made *in extremis*; but subject to the restrictions that are laid upon wills of the same kind. If the testator declares, that the codicil shall be in force; although the will happens to be rendered void for want of those solemnities required by law; yet the codicil shall be good, and observed by the administrators. No executor can be appointed by a codicil, but they may be substituted from the invalid will of the testator to which this was an appendage <sup>g</sup>. A man may make divers codicils, and the first is of equal force with the last, if not contradictory to each other; and herein they differ entirely in their nature from wills. And if two codicils are found without any designation by which to determine the priority of one to the other, and the same thing is given to one person in one codicil, and to another person by the other; the codicils are not void, but the persons therein named ought to divide the bequest between them if it is of a partible nature <sup>h</sup>. If codicils are found written by the testator himself, they ought to be taken as part of the will, and to be proved in common form by the oath of the administrator, with the will annexed; and

<sup>d</sup> Blackst. b. II. c. 32.

<sup>e</sup> Page 215.

<sup>f</sup> God. O. L. pt. 1. c. 1. sect. 3.

<sup>g</sup> Swinb. 14.

<sup>h</sup> Swinb. 15.

in case of opposition, by the witnesses to the hand writing and finding. And it has been usual to exhibit an affidavit of the hand writing and finding, before a probate or administration passes, even in common form; but in case of a real estate, a codicil cannot operate unless it is executed in conformity to the statute of frauds and perjuries <sup>b</sup>.

*Donatio causa mortis.*

**T**HIS is when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another, the possession of any personal goods; under which have been included bonds and bills drawn by the deceased upon his banker, to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors; and is accompanied with this implied trust; that if the donor lives, the property therein shall revert to himself, being only given in contemplation of death, or *mortis causa* <sup>1</sup>. An husband upon his death bed, delivered to his wife a purse of an hundred guineas, bidding her apply it to no other use than her own <sup>k</sup>. So where the husband upon his death bed drew a bill on his banker to pay his wife an hundred pounds for mourning, they were adjudged to belong to the wife, and to be subject to no claims from the heir or executor <sup>1</sup>.—A lady going out of town in a bad state of health, gave her maid a bond executed to her by a third person; saying, if I die it is yours. She died intestate. The administrator brought a bill to have the bond delivered up. By the lord chief justice Hardwicke: this is a sufficient *donatio causa mortis* to pass the equitable interest of this bond upon the

<sup>b</sup> 1 Atk. 426.

<sup>i</sup> Prec. Chan, 269.

<sup>k</sup> 1 P. W. 406, 441. 3—357.

Cro. Car. 396.

<sup>1</sup> Ibid.

intestates death. The question in this case was, whether the nature of the property was capable of being so given : his lordship held it might, as well as a specific chattel ; though no legal property passed thereby ; nothing but the paper, a bond being evidence of a debt ; and the intent being to give the debt, not the paper, he held it a good donation *mortis causa*. Comparing it to the property which passes upon the assignment of a bond, which passes nothing in point of law ; and the assignee must make use of the other's name for recovering on it. He put the case, that if a chattel in possession had been bought by the intestate, and a bill of sale made to the trustee for her use, the property would have been in the trustee, and the equitable in the *cestuy que trust*, who if she had given this chattel so circumstanced to the defendant, it would have been good <sup>m</sup>.

### *General Observations on Wills.*

THE law dispenses with the want of words in last wills and testaments, that are absolutely requisite in all other instruments. Thus by will, a fee may be conveyed without words of inheritance ; and an estate tail without words of procreation. By a devise also, an estate may pass by mere implication, without any express words to direct its course. As where A, devises lands to his heirs at law, after the death of his wife : here, though no estate is given to his wife in express terms, yet she shall have an estate for life by implication. For the intent of the testator is clearly to postpone the heir till after her death ; and if she does not take it nobody else can <sup>n</sup>. If a man devises all his *estate* which he has in such a place, without mentioning the heirs of the devisee ; courts of equity hold that it shall extend to

<sup>m</sup> 3 Ark. 214.

<sup>n</sup> 1 Vent. 376.

such heirs. For the word estate implies the whole property and interest therein, especially in the case of children, to whom the parent, unless there is some express limitation, cannot intend a life estate only <sup>o</sup>.

The cognizance of the ecclesiastical laws extends only to wills that pass goods and chattels; and the probate of testaments concerning lands only, and no goods contained therein, ought not to be in the spiritual court. And if there is a suit to compel to have the probate of such wills a prohibition lies. But a mixed will, which conveys both lands and goods, the probate of such will shall be in the spiritual court. But the probate of the part which passes the lands, shall not prejudice the heir, for it shall not be evidence at the common law; and the examination of the witnesses before the judge of the spiritual court shall not be given in evidence at the common law <sup>p</sup>.

A will executed at Boulogne, and proved in the prerogative court of Canterbury; one of the witnesses residing at Boulogne, in order to perpetuate the testimony thereof, it was moved, that the original will might be delivered out to the person who was the only devisee who could claim any real estate under it, on his giving a reasonable security to return it after the examination of the witness. And lord chief justice Hardwicke directed, that the will should be delivered out accordingly, on security being given for its return in three months. But his lordship said, if there had been other persons under the will interested in it, and they had refused their consent, he would not have made this order, because the taking a will out of the kingdom, is different from any former cases; they having gone no further than ordering them to different parts of England <sup>q</sup>. If an executor proves

<sup>o</sup> Case of Bailey and Gale, Nov. 1750. 2 Ves. 78.

<sup>q</sup> 1 Atk. 627.

<sup>p</sup> Cro. Car. 396

a will of a personal estate, of which one of the legacies is forged, the executor in such case has no remedy in equity; but ought to have proved the will with special reservation to that legacy. And in such case the forgery is to be decreed against in the ecclesiastical court, and the will engrossed without it, and in that state annexed to the probate<sup>q</sup>. Where the testator by his will makes no other disposition of his estate, than the law itself would have done had he been silent, there such a will is useless, and will be rejected; and therefore if a devise is made to a person and his heirs, which person is heir at law to the devisor, this is a void devise, and the heir shall take by descent, as his better title. For the descent strengthens his title, by taking away the entry of such as may possibly have a right to the estate; whereas if he claims by devise he is in as by purchase<sup>r</sup>. If one devises to another by his will, *all his lands and tenements*; here not only all those lands which he has in possession shall pass, but all those which he has in reversion, by virtue of the words *tenement*<sup>s</sup>. If a man hath lands in fee, and lands for years, and devises *all his lands and tenements*, the fee-simple lands pass only; and not the leases for years. But if a man has a lease for years, and no fee-simple, and deviseth all his lands and tenements; the lease for years passes, otherwise the will would be merely void<sup>t</sup>. If a man seised of freehold lands, and of a legal estate of copyhold lands, makes a general devise of all his manors, messuages, lands, tenements, and hereditaments, but makes no surrender of the copyhold lands to the use of his will; the copyhold lands will not pass<sup>u</sup>. The words *all my lands*, in a devise, will pass a house; but the devise of a house will not pass lands<sup>v</sup>. But the devise of a messuage will carry with it a garden and

<sup>q</sup> 1 P. W. 388. <sup>2</sup> Vern. 8. Case of Plume and Beale. <sup>r</sup> 2 Bac. Ab. 79. <sup>s</sup> Terms of the Law. <sup>t</sup> Cro. Car. 293. <sup>u</sup> Case of Gibson and Styles before Lord Hardwicke. <sup>v</sup> Mo. 359.

curtelage; but otherwise of a house, unless it be expressed *with the appurtenances* <sup>w</sup>. Devises as well as other settlements which tend to introduce perpetuity, are void. For though wills are favourably expounded, yet they are to be construed according to the common rules of the courts of law and equity. Therefore a devise to John and his heirs, the remainder to Thomas and his heirs is void; because the law will in no case allow a limitation of a fee-simple upon a fee-simple: because by a devise to John and his heirs, the devisor has transferred the whole estate to him, and then the limitation over must be impertinent and void, when the devisor before has given the whole estate; nor can his devise be good by way of future interest, or a remainder to vest upon a contingency; because no man can say when the heirs of John will fail: and to allow the remainder to Thomas to be good upon such a distant contingency, is to perpetuate the estate in the family of John, to preserve a remainder or interest in Thomas, which probably may never vest<sup>x</sup>.—A devise of lands was made to the eldest daughter, paying 100l. to the second daughter, and 100l. to the third daughter; and if the eldest daughter did not pay the 100l. to the second daughter by such a day, then the testator devised the land to the second daughter, she paying her sisters portion by a certain day. And if she did not pay it, then he devised the land to the third daughter. It was resolved this was not in the nature of a mortgage, to be redeemable after the time of payment was over, but that the eldest daughter not paying at the time appointed, the second daughter should have the land; and the eldest had no relief<sup>y</sup>. The testator having the reversion of lands of which another was tenant for life, devised the lands to a man when he should marry his daughter. The tenant for life dies. The lands shall descend

<sup>w</sup> 2 Cha. Ca. 27.

<sup>x</sup> Gilb. Law of D. 116, 2 Bac. Ab. 80.

<sup>y</sup> 2 Freem. 206.

until the devisee shall marry the daughter <sup>a</sup>. If a man by his last will bequeaths his lands and tenements to one and his heirs, yet if such person die before the testator, the devise is merely void, and his heirs cannot recover the lands by virtue of the will : because the devisee was not in being when the will should take effect ; and the word heirs in this case is not a designation of the person who shall take, but a limitation of the estate ; for if it was a description of the person, then his widow would be endowed <sup>a</sup>. It hath been said, that if the same land is devised to one, and afterwards in the same will to another, they shall take it as joint tenants. But lord Coke was of opinion, that the last devise shall take effect <sup>b</sup>, and lord Hardwicke concurred in this opinion in a case brought before him, but no certain rule can be laid down ; but the determination will vary according to the particular circumstances in each will <sup>c</sup>.

If a legacy be given on condition not to dispute the will, and the legatee commences a suit whereby he disputes the validity of the will, yet this is no forfeiture of the legacy if there was justifiable cause of contesting it <sup>d</sup>. And even though there is no probable cause ; yet where a legatee or other person interested, hath a right to see the will proved in solemn form, his making use of the right cannot as it seems be deemed a disturbance. The testator give to B a legacy on pain of forfeiture of it, in case he should give his wife whom he made executrix, any trouble in relation to his estate. B brings a bill against the wife, for which there was very little colour, and amongst other things demands his legacy. The chancellor was of opinion that the suit was very frivolous, but would not declare the legacy forfeited <sup>e</sup>.

<sup>a</sup> 1 Keb. 802.

<sup>a</sup> Plow. 345. Swinb. 35, 560. Law of Test. 230.

<sup>b</sup> 1 Inst. 112.

<sup>c</sup> Gilb. 159. 2 Atk. 374.

<sup>d</sup> 3 Bac. Ab. 479.

<sup>e</sup> Ch. Ca. King 1.

But in the case of Cleaver and Spuring, a person by his will gives a legacy to his daughter, provided that if she or her husband refuse to give release, or should put the executor to any trouble, the same shall go over to her sister's children. The daughter and her husband being within the custom of the city of London, sue for her orphanage part. Decreed that the legacy was forfeited; for however it might have been construed to be intended only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person, a court of equity could not divest it, or call it back again.

The question before Sir George Lee, as judge of the prerogative court was, whether the execution of a second will is a revocation of the first, though the second is afterwards cancelled; and whether such cancelling sets up the first will again? He gave sentence that it was a revocation, and that the cancelling the second did not set up the first. But this is to be understood of wills conveying personal estates only.—Lady Speke by will gave her lands to one and his heirs. Afterwards she made another will, by which also she gave her lands to the same man and his heirs; but this last will was held void to pass lands, because the witnesses did not subscribe it in her presence. It was objected, that this was good however as a revocation of the former will. By the court. It cannot operate as a revocation, because contrary to her apparent intent. To revoke by a will, within the words of the statute, must be by a will attested by three witnesses, and subscribed by them in the presence of the testatrix, which this will was not.<sup>b</sup>—A will devising lands was made in 1757, and a second will in 1763. The former was never cancelled, the second was cancelled by the

<sup>f</sup> 2 P. W. 258. See page  
and Speke, M. 1689. Carth. 81.

<sup>g</sup> 3 Atk. 798.

<sup>h</sup> Eccleston



testator himself. Both wills were in the testator's custody at the time of his death. The second cancelled, the first uncanceled. The council for the plaintiff the heir at law argued, that the second will was a complete instrument at the time when it was executed. That it clearly proved the testator's intention of revoking the former; and that the execution of the second was as much a revocation of the former as if he had thrown it into the fire. That the preservation of it was merely accidental, and of no consequence; that it had been already totally extinguished, so that it could never revive: that as it never had been republished, it remained a mere nullity, and that no subsequent event could hinder the execution of the second will from operating as a revocation of the former. The second will was therefore the testator's only subsequent will, so long as it remained uncanceled; and when he thought fit to cancel and destroy it, it is manifest he meant to die intestate; and that his heir at law should take. If a woman makes a will and then marries, her will prior to her marriage is thereby revoked, and shall remain so, although she should immediately become a widow. They insisted that the statute of frauds does not alter any of the old requisites of revocation, only in the cases excepted in that act<sup>l</sup>. The same liberality they said ought to prevail in the revocation of wills as in the making of them, and the true principles of the cases upon revocation of wills both before and since the statute of frauds is, the alteration of the testator's intention<sup>k</sup>.—By lord Mansfield.—Here the testator has by two wills devised the lands in question to the defendant. His cancelling the second is a declaration that he does not intend that to stand as his will. Does not that speak that his first will should stand? If he had intended to revoke the first will when he made the second, it must have operated as a declaration that the defendant should not take.

<sup>l</sup> 29 Car. II. c. 3.

<sup>k</sup> 1 Roll. Abr. 614 & seq.

But that could not be his intention, because he devises to the defendant by both. The intention of the testator here is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will; if he does not suffer it to do so, it is not his will. Here he had two; he had cancelled the second, it had no effect; no operation, it is as no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will. And Mr. justice Yeates concurred with his lordship; and further observed, that by the statute of frauds “no devise in writing of lands, &c. or any clause thereof shall be revokable, otherwise than by some other will or codicil in writing declaring the same; or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent.” Now here are none of these circumstances used in what is pretended to be a revocation of this first will, therefore it stands good. Lord Mansfield mentioned a cause at the delegates between Mason and Limbrey, where the testator Samuel Mason had made his will of his real and personal estate, and properly executed two duplicates of it: one of which duplicates he kept in his own hands, the other he delivered to Mr. Limbrey. A little before his death he greatly altered and obliterated his own duplicate, and began to write over a new will, but never finished it; nor did he ever apply to Limbrey to get back his duplicate. Sentence was given for the duplicate of the first will remaining in Mr. Limbrey’s hands; for the imperfect sketch of the unfinished second will was no revocation of the first: he did not mean to die intestate. So in the case now before us. If this second will is not the testator’s will, it is no revocation of the first, he did not mean to die without any will at all.—This cause had been tried at the Sussex assizes, where a verdict had been given for the plaintiff, the heir at law to the testator, against the

the

the defendant, who was his devisee. It came before the court of King's Bench on a motion for a new trial. The rule for a new trial was made absolute, without payment of costs<sup>1</sup>.

A man makes his will duly executed and attested, and at the same time in like manner executes a duplicate thereof. Some time after, having a mind to change one of his trustees, he orders his will to be written over again, without any variation whatsoever from the first, save only in the name of that trustee. And when it was so written over, he executes it in the presence of three witnesses, and the three witnesses subscribe their names, but not in his presence; after this the testator cancels the duplicate by tearing off the seal, and then dies. The question was whether the second will not being good as a will to pass lands, should yet be a revocation of the first? and if it should not, whether the cancelling of the other be a revocation thereof within the statute; and it was decreed, that neither the making the second, nor the cancelling of the first, was a revocation thereof, though in the second there was an express clause, that he did thereby revoke all former and other wills. Wherein the lord chancellor took this distinction; that the second was not intended barely as a revocation of the first, so as to signify his intention of dying intestate; but it was intended as an effectual will to pass the lands to the persons, and in the manner thereby devised; and therefore if it was not good as a will to that purpose, it was no revocation of the first<sup>m</sup>. But, where there was a devise of lands to one, and afterwards the deviser by a will duly executed and attested, devised the lands to another who was a Papist, it was decreed that both the devises were void, for though the latter was void as a will,

<sup>1</sup> Goodright against Glasier, H. 10 Geo. III. 4 Burr. Mans. 2512.

<sup>m</sup> 1 Ab. Eq. Ca. 408.

yet it was good as a revocation <sup>n</sup>. But a will which will pass personal estate is not a sufficient revocation of a former will, whereby a real estate is devised <sup>o</sup>. And although the statute says, that no will in writing concerning personal estates, shall be repealed by word of mouth only, except the words be put into writing, and read to and allowed by the testator, and proved to be so done by three witnesses, yet where a man by will in writing devised the residue of his personal estate to his wife, and she dying, he afterwards by a nuncupative codicil, bequeathed to another all that he had given to his wife, this was resolved to be good; for by the death of his wife, the devise of the residue was totally void, and the codicil was no alteration of the former will, but a new will for the residue <sup>p</sup>.—John Griffin made his will on a sheet of paper, with his own hand, on the second of May 1752, by which he made his wife whole and sole executrix; and bequeathed to his son John Griffin, by his first wife, 600*l*. the interest of 600*l*. in three per cent. annuities to help to bring up his daughter Lavinier; and two freehold houses for the same use of bringing up his daughter, and to her heirs for ever. The daughter to take possession of the annuities at the age of twenty-five years; but if she died before her mother, unmarried, and without a lawful heir, then the two houses were to go to his son John and his heirs for ever, and then he signed his name, but there were no witnesses.—On the 5th of January 1754, he wrote on the same sheet of paper the following words, viz. Memorandum, Blackman-street, 5th January 1754: Whereas I have laid out on a lighter, and a barge, all these, &c. at my death, shall be at my present wife Mary's disposal. And this not to disannul any of the former part made by me on the second of May 1752, except that my wife shall not be liable to pay to my son John, &c.—The whole was written on the first

<sup>n</sup> 2 Ab. Eq. Ca. 771.

• Comyns 451,

<sup>p</sup> 1 Ab. Eq. Ca. 408.

and second sides of a sheet of paper; and the codicil was begun either upon the end of the second, or the beginning of the third, and witnessed on the third side; which circumstance lord Mansfield thought material, though not decisive; and all this codicil (or whatever it may be called) related only to the personal estate, and not at all to the real. The testator subscribed this in the presence of three witnesses, and then he took the sheet of paper in his hand, and declared it to be his last will and testament, in the presence of the three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, and in the presence of each other; which they accordingly did. The questions before the court were: Whether the republication of the said first will, made in 1752, upon the 5th of January 1754, be a publication or republication of his first will within the statute of frauds? Whether any estate passed by the first will either to the daughter or the mother?—It was argued on behalf of the plaintiff, John Griffin heir at law to the testator, that, as beyond all doubt it was no good will to pass lands till the 5th of January 1754, so what happened then was neither a publication nor a republication sufficient to make it a good will within the statute of frauds. Here are two distinct instruments, at two different times; the first unattested relating to the real estate; the second signed, published, and attested, according to the statute of frauds, relating to the personal estate. But the first was originally bad, and could not be made good by the subsequent transaction. And it was further insisted, that no estate passed by this will, either to the mother or the daughter, but it descends to the heir at law to the testator.—By lord Mansfield and the court.—This is a will of an illiterate man, drawn by himself. At first the testator did not know, that any witnesses were necessary; afterwards he found that they were: then he makes a subsequent disposition; which is a

memorandum to be added to it: and it is not material, whether he does this at two days, or at two years distance from writing the former part. A man is not obliged to make his will all at the same time. He does not call this a codicil; nor does the case state it to be so. He plainly considers the whole as one entire disposition; and he expressly declares in the latter, that he does not thereby mean to disannul any part of his former devise or dispositions, one only excepted. There is not a tittle of the latter that relates to the real estate, therefore the only intent of having the three witnesses, was, and must be, to authenticate the former. And the testator having originally signed the former part is out of the case, and makes no difference, for it was not at all necessary or material to it, as a will of personal estate; and the signing alone, unattended with the other requisites, was not sufficient to render it effectual as a will of land, therefore it was totally immaterial. Then the publication of it as of a will. He takes up the sheet of paper, and holding it up says, *it is my will*; and certainly he did not mean a part of it only but the whole of it; and he desires them to attest it. All this must relate to the will that was written on that paper. The second point, namely, whether an estate passed by the first will, either to the daughter or to the mother, is as plain upon the bare reading as any argument can make it; for there can be no doubt of the devise to the daughter, whatever may be the doubt of the interest bequeathed to the mother till the daughter comes of age, for her maintenance. But it is sufficient to bar the plaintiff, that an interest is given to one of them. So that it is extremely clear and plain, that either the mother or the daughter have such an interest, as entitles them to the possession of the estate, and that John Griffin is not to take till the testator's daughter shall be dead without issue<sup>4</sup>.

<sup>4</sup> Carleton ex demiss. Griffin against Griffin, E. 31 Geo. II. 1 Bur. Mansf. 549.

If lands are devised to be sold for payment of portions, and one of the children dies before the portion is due, and before the lands are sold, the administrator of the child is entitled to the money <sup>r</sup>. So if money is devised to be laid out in land, and settled on a man and his heirs; he may come into court, and pray to have the money, and that no purchase may be made; for no other has any interest in it. But if he die before it is paid, or laid out in land, and the question is between the heir and executor who shall have it; the heir shall have it, and it shall be considered as land; first, because the heir in all cases is favoured; and secondly, if the executor should have it, it would be against the words of the will, which gave it to the heir <sup>s</sup>. A devise of a rent charge to his younger son, *towards his education, and bringing him up in learning*; it is not conditional, and he shall have the rent though not brought up in learning; for the words *towards his education*, are only to shew the intent and consideration of the payment of the sum <sup>t</sup>. Devise of lands to his wife for life, remainder to his second son in fee; provided if his third son shall, within three months after the wife's death, pay 500l. to the said second son, his executors or administrators, then he devised them to the said third son and his heirs. The third son died, leaving the wife; then the wife died. The heir of the said third son may enter on the lands upon payment or tender of the 500l. It is not a condition, but an executory devise <sup>u</sup>.

If a man makes his will, and afterwards contracts for the purchase of lands; the lands contracted for will not pass by the will, but descend to the heir at law. But if a good title cannot be made of the lands, as the heir in such a case cannot have the lands, so he shall not have the money in-

<sup>r</sup> 1 Vern. 276.<sup>s</sup> Prec. Chan. 344.<sup>t</sup> 2 Lev. 154.<sup>u</sup> Case

of Marks and Marks, M. 5 Geo. I. 10 Mod. 420.

tended to be laid out, but it shall pass by the will <sup>v</sup>. But a man may by his will dispose of his chattels and personal estate that he shall acquire in any future time after making his will to the time of his death. And this is necessary from the reason of the thing; because the chattels and personal estate are in a continual fluctuation; and if the law were not so it would create very great confusion, or else would render it necessary for a man to make a new will every day. But it is not so with lands, for they are fixed and permanent: and therefore if a man makes his will, and devises therein all the lands which he shall have at the time of his death; and after that he purchases lands, and dies without republishing his will in due form, or making a new one, although his intent to the contrary is very apparent, yet it is a void devise: for a man cannot devise any lands but what he has at the time of making his will. And this was adjudged upon great deliberation, by Holt ch. ju. and the court, in the case of Bunker and Cook; and the judgment was affirmed afterwards upon a writ of error in the house of lords, Feb. 24, 1707 <sup>w</sup>. If a man seised of lands in fee which he sows, and having devised it dies before severance, the devisee shall have the corn, and not the executor of the devisor: for the devisee in relation to the chattels belonging to the land is put in the place of the executor by the words of the will <sup>x</sup>. But if a man seised of lands in fee, or fee-tail, bequeaths the trees growing on such land at the time of his death from the heir to some other person; this devise is good, notwithstanding the land on which it grows is not devisable. The trees being part of the freehold, and descend together with the land, but it is not so of corn. So if a man seised of land in right of his wife sow the land, and devise the corn growing on such land, and die before the corn

<sup>v</sup> 1 Atk. 573.

<sup>w</sup> Gilb. on Dev. 122.

<sup>x</sup> M. 20 Ja. I.

Winch's Rep. 51.



is reaped ; in this case the legatee shall have the corn, and not the wife ; but it is otherwise of grass and herbs not separated from the ground at the time of the death of the testator.—If a man seised in right of his wife, lets the land for years to a stranger, and the lessee sows the ground, and afterwards the wife dies, the corn not being ripe, in this case the lessee may devise the same corn notwithstanding his estate is determined. So also the tenant by curtesy, or tenant in dower <sup>y</sup>.

A man cannot bequeath by will any of those goods or chattels which he has jointly with another ; for if he should bequeath his portion thereof to a third person, yet the survivor who had those goods or chattels jointly with another, shall have that portion so bequeathed against the legatee <sup>z</sup>. If a devise is made to John and his heirs ; and if he dies without issue living Thomas, then to Thomas and his heirs, there nothing vests immediately in Thomas, because the whole estate is transferred to John ; yet the limitation is good by way of executory devise or interest, because it is to vest on a contingency which is to happen on a life in being, therefore not subject to the inconvenience and danger of a perpetuity ; because John is only tied up from alienating for life, and his heirs are at liberty to dispose of it after the death of Thomas <sup>a</sup>. The utmost length that an executory devise hath hitherto been allowed to happen in, is that of the life, or lives in being, and one and twenty years afterwards. As, when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one years, and his heirs ; the utmost length of time that can happen before the estate can vest, is the life of the mother, and the subsequent infancy of her son ; and such has been decreed to be a good executory devise <sup>b</sup>.

<sup>y</sup> Swinb. 190.

<sup>z</sup> Ibid. 189. See page 119.

<sup>a</sup> Gilb. on Dev. 116.

<sup>b</sup> Blackst. b. II. c. 11.

The testator bequeathed all his household goods to his wife for life, and after to his son: It is a good devise over, and the same as if the devise had been only of the use of them for life. And by lord Sommers: It is a rule, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the thing itself<sup>c</sup>. A farmer devised his flock, which consisted of corn, hay, cattle, and the like, to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them. But the master of the rolls said, the devise over was good; but said, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of sale. And an account was decreed to be taken accordingly<sup>d</sup>. The testator being possessed of a personal estate of the value of 333*l*. having a wife and sister, but no issue, devised that such part of his estate as his wife should leave of her substance, should return to his sister, and the heirs of her body, and made his wife executrix. The wife married, and died, living her husband. The master of the rolls said, that it is now established, that personal things or money may be devised for life, and the remainder over; and that though it be true that the wife had a power over the principal sum, provided it had been necessary, yet not otherwise, and he directed that the master should enquire how much had been applied for the wife's subsistence, and the husband to account for the residue<sup>e</sup>. When a man devises goods to go as heir-looms with such an estate, so far as by law they may; the court, to the end that the testator's intention may take effect, will decree a conveyance from him

<sup>c</sup> Hide and Parrot, M. 1696. 2 Vern. 391.  
 Burrodale, 1 Ab. Eq. Ca. 381.

<sup>d</sup> Case of Hale and  
 1 P. W. 651.

to whom they may come as personalty<sup>f</sup>. A devise to one's children and grand-children generally, refers only to such children or grand-children as were living at the time of making the will; but if a devise were, to one's children and grand-children *living at the time of the death of the testator*, a child *in ventre sa mere*, might in such case be so far regarded, as to be looked upon as living<sup>g</sup>. For a devise to an infant *in ventre sa mere* is good, and the freehold shall descend in the mean time<sup>h</sup>. So if a man devises lands to be sold for the increase of children's portions, a child born since the will shall have a share<sup>i</sup>.

It is usual in wills to devise *all the household stuff*. By which words plate about the house, and not for ornament passes. But books, cattle, cloaths, coaches, carts, waggons, corn, and any thing fixed to the freehold will not pass thereby<sup>k</sup>. A devise of all his goods, chattels, and household goods, in and about his house, will not pass money in the house<sup>l</sup>. And lord Hardwicke decreed that a devise of jewels, plate, pictures, medals, and furniture, did not pass a library of books under the word furniture<sup>m</sup>. Also it has been decreed in chancery on a devise by a man to his wife of all his personal estate at a place called W. whatever should be there at the time of his death should pass, such as coaches, horses, &c. the personal estate being fluctuating and varying until the time of the testator's death<sup>n</sup>. But where a man devised all his goods, chattels, household stuff, *and other things*, which then were, and should be in his house at the time of his death, and sometime after died, leaving about 255L. in ready money in the house, it was decreed this ready money did not pass. For by the words *other things*, should

<sup>f</sup> Barnardst. 54.<sup>g</sup> 1 P. W. 342.<sup>h</sup> 1 Roll. Ab. 609.<sup>i</sup> Lev. 135.<sup>j</sup> 2 Cha. Rep. 211.<sup>k</sup> 2 P. W. 419. <sup>l</sup> 3 Atk. 370.<sup>m</sup> Vern. 638.<sup>n</sup> Swinb. 185.<sup>o</sup> 3 Atk. 202.<sup>p</sup> 2 Vern. 688.

be intended things of like nature and species with those before mentioned °.

If a legacy to a child is chargeable both on the personal and real estate, then so much thereof as the personal estate will extend to pay, shall go to the executors or administrators of the child. For in such case, as far as the executor or administrator claims out of the personal estate, he shall succeed according to the rule of the spiritual court, where these things are determinable, although the infant legatee dies before the portion or legacy becomes due: but so far as such legacy is charged upon the land, the court of chancery will not countenance the loading of an heir, merely for the benefit of an administrator p.

### *Devise of Copyhold Lands.*

**C**opyhold and other customary lands are devisable or not, according to the custom of the respective manors. And generally a devise of copyhold will not pass without a surrender to the use of the will. But if such lands are devised to a child or widow it is otherwise; for in favour of such, a court of equity will supply the defects of surrender: but the same indulgence is not granted to grand children, or to a natural child, and consequently not to any more distant kindred q.

### *Of Executors and Administrators.*

**A**LL persons are capable of being executors that are capable of making wills, and many others besides; as feme-coverts, and infants: nay even infants unborn, or *in ventre sa mere*, may be made executors r. But no infant can

° Case of Trafford and Burridge, Ab. E. Ca. 201. P 1 P. W. 276. 601.

q 2 Vezey. 582. 1 Will. 161.

r West's Symboleo. part 1. sect. 635.

act as such till the age of seventeen years ; till which time administration must be granted to some other *durante minore ætate*. In like manner as it may be granted *durante absentia*, or *pendente lite*, when the executor is out of the realm, or when a suit is commenced in the ecclesiastical court touching the validity of a will. This appointment of an executor is essential to the making of a will, and it may be performed either by express words, or such as strongly imply the same. But if the testator makes his will without naming any executor, or if he names incapable persons, or if the executors named refuse to act. In any of these cases, the ordinary must grant administration *cum testamento annexo* to some other person : and then the duty of an administrator, as also when he is constituted only *durante minore ætate* of another, is very little different from that of an executor<sup>1</sup>. And this was law so early as the reign of Henry II.<sup>2</sup> The duties of executors and administrators are in general nearly the same ; but an executor may do many acts before he proves a will, and an administrator can do nothing till letters of administration are issued ; because the former derives his power from the will of the deceased, the latter receives it entirely from the ordinary<sup>3</sup>. If a stranger takes upon him to act as executor, without any just authority, (as by intermeddling with the goods of the deceased, and many other transactions<sup>4</sup>) he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages : but merely doing acts of necessity or humanity, as locking up the goods, or burying the corps of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong<sup>5</sup>. Such an one cannot bring an action himself in right of the deceased, but actions may be brought against

<sup>1</sup> 1 Roll. Ab. 907. Comb. 23.<sup>2</sup> Glanv. b. 7. c. 6.<sup>3</sup> Comyns. 151.<sup>4</sup> 43 Eliz. c. 8. Went. c. 14.<sup>5</sup> Dyer, 166.

him<sup>x</sup>. And in all actions by creditors against such an officious intruder, he shall be named an executor generally; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof<sup>y</sup>. He is chargeable with the debts of the deceased, so far as assets come to his hands; and against creditors in general, shall be allowed all payments made to any other creditor in the same, or a superior degree, himself only excepted<sup>z</sup>. And though as against the rightful executor or administrator he cannot plead such payment, yet it shall be allowed him in mitigation of damages<sup>a</sup>. Unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt<sup>b</sup>. But though a person hath not meddled with the goods of the testator, and is therefore not compellable; yet if a legacy is left to him, he may be compelled to stand to the executorship, or else to lose his legacy<sup>c</sup>. The refusal to take upon him the executorship cannot be by word only, but it must be entered and recorded in court<sup>d</sup>.—The testator made the defendant Allen, who was a feme-covert, his executrix, the husband being then in England, but at the death of the testator the defendant's husband was in the West-Indies. It was moved for an injunction to restrain the defendant from getting in the assets of her testator, and for a receiver to be appointed, By lord Hardwicke. There are several instances where this court hath interposed to prevent an executor from getting assets of a testator into his hands upon particular circumstances. And this is one of those cases; for the husband being in the West-Indies, and not amenable to the process of this court, the plaintiff can have no remedy, if the executrix should waste the assets, or refuse to pay, because the

<sup>x</sup> Bro. Ab. tit. Adm. 8.    <sup>y</sup> 5 Rep. 32.    <sup>z</sup> Moor, 527.    <sup>a</sup> 12 Mod. 443, 451.    <sup>b</sup> Went. c. 14.    <sup>c</sup> Gibb. 469.    <sup>d</sup> Swinb. 443.

husband must be joined in the action. And a receiver was appointed to collect in the assets, and to bring actions in the name of the executrix, for recovery of debts due to the testator, on giving security to indemnify the executrix and her husband on account of such actions brought <sup>e</sup>.

The first duty incumbent on an executor or administrator, is, to bury the deceased in a manner suitable to the estate he leaves behind him. Necessary funeral expences are allowed previous to all other debts and charges; but if the executor or administrator is extravagant, it is a species of devastation, or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased <sup>f</sup>. The will of the deceased must be duly proved, which is done either in common form, or in more solemn form of law. When a will is not litigated, the oath of the executor only is sufficient for the probate of it in common form <sup>g</sup>. But where the testament is to be proved in form of law, it is requisite that such persons that have interest, that is to say the widow and next of kin to the deceased, to whom the administration of his goods ought to have been committed if he had died intestate, be cited to be present, at the probation and approbation of the testament. In whose presence this will is to be exhibited to the judge, and petition made by the party that prefers the will, and an order made for the receiving, swearing, and examining of the witnesses thereupon, and for the publishing or confirming thereof. Witnesses are thereupon received and sworn; and examined every one of them secretly and severally, not only upon allegations or articles made by the party producing them, but also upon interrogatories from the adverse party; and their depositions being committed to

<sup>e</sup> Case of Taylor and Allen, Oct. 29, 1741. 2 Atk. 213.  
God. p. 2. c. 26. sect. 2.

<sup>g</sup> God. O. L. 65.

<sup>f</sup> Salk. 196.

writing, if the proof of the will is sufficient, the judge pronounces for its validity<sup>b</sup>. If a will is proved only in the common form, the executor is compellable to prove it again in due form of law; and if the witnesses are dead in the mean time, it may endanger the whole testament, unless ten years, or as some say thirty<sup>i</sup>, (the latter of which is the time established by common opinion) are passed since the probation; after which term it possesses a prescriptive right. But if the testament is proved in due form of law, the executor is not to be compelled to prove it any more; and notwithstanding all the witnesses die, the testament still retains its force<sup>k</sup>. When the will is so proved, the original must be deposited in the registry of the ordinary, and a copy thereof in parchment, under the seal of the ordinary, delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the *probate*. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, to dispose of the goods of the deceased is vested in him: and he is directed by the statute of distributions<sup>l</sup>, to enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of an hundred shillings, or five pounds, in two distinct dioceses or jurisdictions; then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative, whence the court where the validity of such wills is

<sup>b</sup> Swinh. 448.<sup>i</sup> Godol. O. L. 62.<sup>k</sup> Swinh. 449.<sup>l</sup> 22 & 23 Car. II. c. 30.

tried,



tried, and the office where they are registered, are called the prerogative court, and the prerogative office of the provinces of Canterbury and York<sup>m</sup>. Where one dies possessed of goods in London and Dublin, in such case the resolution seems to have been, that the archbishop of Canterbury, by his prerogative, was to grant administration of the goods in London, and the archbishop of Dublin for those in Dublin<sup>n</sup>. In case a person has *bona notabilia*, both in the provinces of York and Canterbury, the will must be proved either before both metropolitans, if within the jurisdiction of each there are *bona notabilia* in diverse dioceses; or else if in either of the provinces, the goods lay in one diocese, then the will must be proved before the particular bishops, in whose several dioceses the goods are<sup>o</sup>. Or if the testator had goods in the jurisdiction of one metropolitan, laying in diverse dioceses, and in the other but in one diocese: then the will is to be proved before the archbishop, who has jurisdiction over the two dioceses, and before the bishop of the diocese besides. Where one dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, where by prescription, or composition, or other special title, the proba- tion and approbation, of the testaments of such as dwell and die there appertains to the judge of that peculiar, there shall be several administrations, and the archbishop shall have no prerogative, because the peculiar was first derived out of his jurisdiction<sup>q</sup>. But a man who dies possessed of goods in several peculiars within the same diocese, administrations shall not be granted by the bishop of the diocese, but by the metropolitan, because they were exempt from ordinary jurisdiction<sup>r</sup>.—Mr. Dunning (solicitor general) shewed cause against a mandamus to be directed to the judge of the

<sup>m</sup> 4 Inst. 335.<sup>n</sup> Gibb. 472.<sup>o</sup> Went. 46.<sup>p</sup> Went. 47.<sup>q</sup> Cro. Eliz. 719. Gibb. 472.<sup>r</sup> Swinb. 440.

prerogative court of Canterbury, commanding him to grant probate of the will of Joseph Biddleson, Esq; deceased, to Lovegrove, there having been a decree of the court of delegates in Lovegrove's favour, and in affirmance of the validity of the will; but a fresh caveat had been entered by a fresh party (Bethel), who claimed as next of kin to the testator. The cause shewn against granting this mandamus was, that a suit was then depending in the spiritual court concerning the validity of this will. The court were unanimous, that where a suit is depending in the spiritual court concerning the validity of a will, that court has jurisdiction of the matter: and here the validity of this will is actually in litigation in that court<sup>s</sup>.

The executor or administrator is next to make an inventory of all the personal effects of the deceased, both in possession or action; and likewise his credits. And when legally called upon, he is to deliver in such inventory upon oath. And it is said, that if an executor, without making an inventory, shall interfere in the administration of the goods of the deceased, except in certain cases; such as the funeral expences, the necessary preservation of the goods, and the like, he shall be bound to answer it to every one of his creditors, his whole debt<sup>t</sup>. And therefore if any creditor or legatee affirms, that the testator had more goods than are comprized in the inventory, he must prove the charge, otherwise the judge is to give credit to the inventory, as being supposed to be made in due form of law<sup>u</sup>. By the constitution of Othobon, the inventory shall be made in the presence of some credible persons, who shall competently understand the value of the goods belonging to the deceased;

<sup>s</sup> King against Dr. Hay, H. 9. Geo. III. 4 Burr. Manf. 1295.

<sup>t</sup> Swinb. 228. Athen. 107.

<sup>u</sup> Swinb. 426.

For it is not sufficient to make an inventory, unless the goods therein contained are particularly valued and appraised by some honest and skilful persons, to be the just value thereof in their judgments and consciences; being estimated according to such price as the same might be sold for at that time v. And as the time of exhibiting such inventory is left to the discretion of the ordinary, so may he remit the making of an inventory for a reasonable cause; as, where it may be expedient that the quantity of the goods should not be divulged. By the practice of the temporal courts, if the goods of the deceased shall be appraised by any honest persons in the neighbourhood, and reduced into an inventory, and afterwards such inventory is exhibited before the judge who proved the will, or granted administration upon the oath of the executor or administrator; such inventory shall receive credit in all causes and courts; and he that exhibits it shall be freed from the burden of proving the truth thereof, or that the testator had no more goods; but the legatee, or other persons preferring claims, are bound to prove that goods have been omitted therein w. The inventory may be made in the following form, with variations, according to the condition of the goods and effects to be inventoried.

v Swinh. 425.

w 1 Ough. 344.

*A true and penfull inventory of all the goods, chattels, wares, and merchandises, as well moveable as not moveable, of A. B. late of C. in the county of , in the diocese of , yeoman, deceased, made by us whose names are hereunto subscribed, the day of in the year of our Lord*

				l.	s.	d.
His purse and apparel,	—	—	—	15	0	0
Horses and furniture,	—	—	—	20	0	0
Horned cattle,	—	—	—	27	0	0
Sheep,	—	—	—	20	0	0
Swine,	—	—	—	0	13	0
Poultry,	—	—	—	0	3	4
Plate and other household goods,	—	—	—	18	0	0
One lease of, &c.	—	—	—	30	0	0
Rent in arrear,	—	—	—	35	0	0
Corn growing at the time of his death,				12	0	0
Hay and corn,	—	—	—	10	0	0
Ploughs and other implements of husbandry,				6	10	0
Debts,	—	—	—	100	0	0

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Total 284 6 4

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Other debts supposed to be desperate,	—	25	2	6
Debts owing by the deceased,		250	0	0
Appraised by us the day and year above written				

D. E.

F. G.

But after the inventory is exhibited, a creditor shall not be admitted to object thereto in the ecclesiastical court; for the

the statute \* which requires the executor or administrator to make an inventory, only enjoins them to deliver it upon oath into the keeping of the ordinary; and the ordinary by the same statute, is required to receive the same so presented or tendered to be delivered.—The court of King's Bench was moved, to grant a prohibition to the ecclesiastical court, on behalf of Mrs. Catchside the administratrix. She having been cited into an inferior ecclesiastical court at the promotion of Ann Ovington a creditor, to exhibit an inventory: she accordingly brought one in, and the creditor objected to it, and obtained a decree; the administratrix then appealed to the superior ecclesiastical court, which affirmed the decree. The suggestion on which the plea for a prohibition was built was, the want of jurisdiction of those courts. The reply to which, on shewing cause was, that it being after sentence, it was now too late for a prohibition, unless it should appear that they had determined contrary to law. But lord Mansfield and the court were of opinion, that from the face of the proceedings it appeared, that the spiritual court had no jurisdiction, and therefore the rule for a prohibition was made absolute, y. He is next to collect in all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased, and having the same property in his goods as the principal had when living, and the same remedies to recover them. †. Whatever is so recovered that is of a saleable nature, and may be converted into ready money is called assets, in the hands of the executor or administrator; that is, sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands,

\* 21 Hen. VIII. c.  
6 Geo. III. 1 Barr. 1212.

† Case of Catchside and Ovington, T.  
2 Co. Litt. 209.

he may convert into ready money to answer the demands that may be made upon him <sup>a</sup>. The executor is next bound to satisfy the legal claim of creditors upon the effects of the testator. And herein the king, if a creditor, shall be first satisfied <sup>b</sup>; next such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen <sup>c</sup>; money due on poor rates <sup>d</sup>; for letters to the Post Office <sup>e</sup>; and some others. The next in order to be discharged are debts of record; as judgments (docketed according to the statute 4 & 5 W. & M. c. 23.) statutes and recognizances <sup>f</sup>. Then follow debts due on special contracts; as for rent (for which the lessor has often a better remedy in his own hands by distraining) or upon bonds, covenants, and the like; under seal <sup>g</sup>. Lastly, debts on simple contracts, viz. upon notes unsealed, and verbal promises. Among these simple contracts, servants wages are by some preferred to any other, and with great reason <sup>h</sup>: Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to <sup>i</sup>. But an executor of his own wrong is not allowed to retain; for that would tend to encourage creditors who should first take possession of the goods of the deceased; and would besides be taking advantage of their own wrong, which is contrary to the rule of law <sup>k</sup>. If a creditor constitutes his debtor for his executor, this is a release or discharge of the debt, whether the executor acts or no; provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it was unfair to defraud the testator's creditors of their just debts, by a release which is abso-

<sup>a</sup> Dyer 23.

<sup>b</sup> Mag. Ch. c. 18.

<sup>c</sup> 30 Car. II. c. 3.

<sup>d</sup> 17 Geo. II. c. 38.

<sup>e</sup> 7 Ann. c. 10.

<sup>f</sup> 4 Rep. 60. Cro.

Car. 363.

<sup>g</sup> Went. c. 12.

<sup>h</sup> 3 Roll. Abr. 927.

<sup>i</sup> 10 Mod. 426.

<sup>k</sup> 5 Rep. 30.

lutely voluntary <sup>1</sup>. Also if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest; for without a suit commenced, the executor has no legal notice of the debt <sup>m</sup>. If there are two creditors in equal degree, and both sue; if the executor by covin helps the creditors who instituted the suit last to his judgment and execution first; and there are no assets left to pay the other creditor, he must be satisfied out of the executor's own estate, if this covin is proved against him. But the confession of an action where there is a real debt, is no covin; and such recovery by confession is a good plea for the executor against another creditor <sup>n</sup>. If an heir is sued on the bond debt of his ancestor in which he is bound, and he pays the money, the executor shall reimburse him as far as there are personal assets of the testator's come to his hands, if it is not otherwise ordered by the will <sup>o</sup>. If a man dies indebted by bond, and seised in fee of diverse lands, part of which he devises to one, and other part he permits to descend to his heir, (not mentioning them in his will) the lands permitted to descend shall be first applied to pay the bond debt. And the reason is, because the applying the devised lands to pay the bond debts, would disappoint the will, which equity will not permit if it can be avoided: whereas it no way disappoints the will to say, that the lands not mentioned should be in the first place liable to pay the debts. But it seems it would be otherwise, if the testator had devised his lands to his heir at law; for though such devise were void as to the purpose of making the heir take otherwise than by descent; yet it shews the testator's intent, that the heir should have the land; and therefore it seems,

<sup>1</sup> Salk. 299, 303. Plow. 184. 1 Roll. Abr. 921.

Blackst. b. II. c. 32.

<sup>n</sup> Swinb. 459.

<sup>m</sup> Dyer. 84.

<sup>o</sup> 1 Chan. Ca. 74.

<sup>p</sup> P. W. 175.

that the lands devised to one, and the other lands devised to the heir at law, should in such case contribute in proportion to pay the bond debts. Also for the abovementioned reason, it seems that the lands permitted to descend to the heir at law, and not mentioned in the will, shall be applied to pay the bond debts, before a specific legacy; lest otherwise the testator's intention should be disappointed<sup>p</sup>.

So where lands, upon which there was a mortgage, were devised to one, and other lands descended to the heir at law, it was decreed by the lord chief justice Hardwicke upon great deliberation, that where the personal estate is insufficient to discharge the incumbrance, the ultimate fund is the land descended to the heir at law: and although the creditor may come on which fund he pleases; yet if he proceeds against the lands mortgaged, the devisee may have his remedy over against the heir at law. Otherwise the mortgage might exhaust the whole lands devised, and there would be no benefit in the will to the devisee<sup>q</sup>.

### *Of Assets.*

**A**SSETS are of two sorts; the one assets by *descent*, the other assets *in hand*. Assets by *descent* are, where a man is bound in an obligation, and dies seised of lands in fee-simple, which descend to his heir, then his lands shall be called assets to pay the same debt; and by that means the heir shall be charged, as far as the land so to him descending will stretch. Assets *in hand* are, when a man in like manner indebted makes executors, and leaves them sufficient to pay; or some commodity or profit is come unto them in right of their testator; this is called assets in their hands. There is



also another division of assets, into *legal* and *equitable* assets : *legal* assets are such as are liable to debts and legacies by the course of law ; *equitable* assets are such as are only liable by the help of a court of equity. So also there are *real* and *personal* assets : *real* assets are such as concern the land ; *personal* are such as concern the personal estate only<sup>r</sup>. If a man devises land to be sold ; neither the money arising from such sale, nor the profits of the land for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased<sup>s</sup>. But if a man devises lands to be sold by one for payment of his debts and legacies, and makes the same person his executor, and dies ; the money made by such person upon the sale of the land, shall be assets in his hands<sup>t</sup>. But otherwise it is, where the land is devised to be sold by *the executor and others* ; for there the money shall not be assets : for they are not trusted with it as executors<sup>u</sup>. But though such is not assets at law, it shall be assets in equity<sup>v</sup>. If there is a mortgage for years, though never so many, this is assets at law. Because the whole interest is not gone from the mortgagor, the reversion in fee being left in him : but if it is *a mortgage in fee*, it is only assets in equity, because the legal estate is gone out of the obligor. A jointress holding of lands mortgaged, it was decreed, that she paying the mortgage should hold over till she and her executors were repaid with interest<sup>w</sup>. If a man is seised of an advowson in fee, and the church becomes void, the void turn is a chattel : and if the patron dies before he presents, the advowson does not go to his heir, but to his executor<sup>x</sup>. An advowson in fee has been decreed to be assets in the hands of the heir for payment of debts. And the decree was affirmed in the house

<sup>r</sup> Burn's Ec. L. art. Wills.<sup>s</sup> 21 Hen. VIII. c. 5. sect. 5.<sup>t</sup> 1 Roll. Abr. 920.<sup>u</sup> Ibid.<sup>v</sup> 1 Ab. Eq. Ca. 141.<sup>w</sup> Case

of Bertue and Style, 1 Cha. Ca. 271.

<sup>x</sup> Watf. c. 9.

of lords<sup>r</sup>. Assets in Ireland are assets in England: and so it hath been resolved, that if the executor hath goods of the testator in any part of the world, he shall be charged in respect of them<sup>s</sup>. But bonds and specialties are no assets until the money is paid<sup>t</sup>. If an executor recover damages in trespass for goods taken away in the life-time of the testator, this, when recovered, shall be assets: because he recovers it as executor<sup>b</sup>. A debt due from an executor to a testator, is assets in equity to pay legacies<sup>c</sup>. The interest which a master hath in a servant is not assets in the hands of an executor; for a servant whose master is dead, is legally discharged, and is not servant either to the heir or executor. But, says Wentworth<sup>d</sup>, meet and honest it is that one of them continue him in service, till a fit time of providing for him a new master; and fit for him not to depart suddenly. Notwithstanding the interest which one hath in an apprentice, is a chattel personal, and shall go to the executors<sup>e</sup>. A reversion expectant upon an estate for life, is assets in the hands of the heir: but the creditor cannot compel the heir to sell it, but must wait till it falls<sup>f</sup>.

### *Of the Payment of Legacies.*

**T**HE executor is bound to pay legacies so far as the assets extend; but herein he cannot give himself the preference as in the case of a debt<sup>g</sup>. A legacy is a bequest or gift of goods and chattels by testament; and the person to whom it is given is styled the legatee; which every person is capable of being unless particularly disabled by the common

<sup>r</sup> 3 P. W. 329. Stra. 879.    <sup>s</sup> Cro. Ja. 55. 6 Co. 46.    <sup>t</sup> 1 Vent. 96.  
<sup>b</sup> 1 Roll. Abr. 920.    <sup>c</sup> 3 Cha. Ca. 89.    <sup>d</sup> Office of an Executor,  
page 55.    <sup>e</sup> 2 Bac. Abr. 416. Went. 55.    <sup>f</sup> Ab. Eq. Ca. 275.  
<sup>g</sup> 2 Vera. 434. 2 P. W. 25.

law, or statutes<sup>n</sup>; as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor; for if I have a general or pecuniary legacy of 100l. or a specific one of a piece of plate, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator; the rule of equity being, that a man must be just, before he is permitted to be generous<sup>l</sup>. If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the residuum. And if a contingent legacy is left to any one; as, when he attains, or, if he attains the age of twenty-one years, and he dies before that time, it is a lapsed legacy<sup>k</sup>. But a legacy to one to be paid when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in presenti*, although it be *solvendum in futuro*: and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. But if such legacies are charged upon a real estate, in both cases they shall lapse for the benefit of the heir. And in case of a vested legacy, due immediately, and charged on land, or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator<sup>l</sup>. A legacy is not barred by the statute of limitation, so that a legatee may claim it twenty years after the death of the testator<sup>m</sup>. But if the legatee takes a bond

<sup>n</sup> 25 Car. II. c. 2. 1 Geo. I. st. 2. c. 13. 9 & 10 W. III. c. 32. 5 Geo. I. c. 27. <sup>i</sup> Co. Litt. 111. Alcyu 39. <sup>k</sup> 1 Ab. Eq. Ca. 295. Dyer, 59. <sup>l</sup> 2 P. W. 601. 26, 27. Blackst. b. II. c. 32. <sup>m</sup> 2 Freem. 22.

of the executor for his legacy it is extinguished<sup>n</sup>. Legacy given out of a term for years, if the term determines, the legacy is extinct<sup>o</sup>. A legacy of a lease of tythes is extinguished by a renewal of the lease; but a republication of the will after the renewal restores the legacy<sup>p</sup>.—A legacy was devised out of debts due in several counties, and they were all called in before the testator's death; yet the legacy remained good. And a difference was taken between a pecuniary and a specific legacy; for in the first case the legacy will remain, though the debt upon which it is charged is paid in: but the specific legacy may be lost by being changed. So where the legacy was greater than the debt out of which it was directed to be paid amounted to, yet such sum being expressly devised, and there being assets, it was directed to be paid<sup>q</sup>.

It has been said, that an executor is not bound to pay a legacy without security being given him to refund in case there happens to be a defect of assets<sup>r</sup>. But lord Hardwicke declared that legatees are not obliged to give security; as common justice will compel them to refund in such a case, although no security has been given for such purpose<sup>s</sup>. If an executor voluntarily pays a legacy, he may be obliged if solvent to pay the rest: but if the executor prove insolvent, the court will admit a bill by the unsatisfied legatees to compel such legatee to refund<sup>t</sup>. And much more shall a creditor oblige a legatee to refund on a defect of assets<sup>u</sup>. But if an executor had at first enough to pay all the legacies, and afterwards by his wasting the assets occasions a deficiency, the legatee who has recovered his legacy shall have the advantage of his legal diligence, which the other legatees

<sup>n</sup> Yelv. 39.<sup>o</sup> Cha. Ca. Fin. 464.<sup>p</sup> 2 Vezey, 418.<sup>q</sup> Raym. 335. Chan. Ca. Fin. 152.<sup>r</sup> 1 Cha. Ca. 149.<sup>s</sup> 1 Atk.

491. 1 Vern. 93.

<sup>t</sup> 2 Vez. 194.<sup>u</sup> 1 Vern. 94.

neglected by not bringing their suit in time <sup>v</sup>.—On a bill by an executor against a legatee, to refund a legacy voluntarily paid him by an executor, the assets falling short to pay the testator's debts; it was decreed by Sir Joseph Jekyll, master of the rolls, that the defendant should refund to the plaintiff; and that an executor may bring a bill to refund a legacy voluntarily paid him, as well as a creditor; for the executor paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to oblige him to refund <sup>w</sup>. But where a specific legacy is devised, the legatee shall have it entire, though there are not sufficient assets to pay the rest of the legacies. And as there is a benefit to a specific legatee that he shall not contribute; so there is a hazard the other way; for instance if such specific legacy being a lease, be evicted; or being goods, be lost or burnt; or being a debt be lost by the insolvency of the debtor; in all these cases the specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them <sup>x</sup>. But the devisee of an annuity for life charged on the personal estate, where there is a deficiency of assets, shall abate in proportion with the other legatees: for this is not to be considered as a specific legacy <sup>y</sup>. Also charities, though preferred by the civil law, yet they ought to abate in proportion <sup>z</sup>. And if the testator's personal estate is not sufficient to pay all legacies, the executors having legacies bequeathed them shall abate in proportion with the other legatees; even though their legacies be given them for their care and trouble, and not generally; for those are only words of course; and as they need not take upon them the office unless they please, they accept the legacies subject to that con-

<sup>v</sup> 1 P. W. 495.<sup>w</sup> Viner, art. Devise, Q. d 35.<sup>x</sup> 1 P. W. 540.<sup>y</sup> 3 Ark. 693.<sup>z</sup> 2 P. W. 25.

tingency<sup>a</sup>. In like manner land legatees and money legatees shall abate proportionably. If the executor has only bad debts he may offer to assign them to the legatee, and may be thereby discharged<sup>b</sup>.—If a man gives legacies to his daughters, charging his real estate with the payment thereof: and other legacies to his brother, without charging his real estate with the payment of these: if the daughters recover their legacies out of the personal estate, then the brother shall stand in the place of the daughters, and take so much out of the land for his legacy, as the daughters had exhausted out of the personal assets<sup>c</sup>. According to Dr. Swinburne, if an executor has made a legal inventory, he is not compellable to pay to any legatee his whole legacy, if there is a danger of assets falling short, notwithstanding such legatee is first named in the will; or though it is thereby directed, that such an one shall be paid in the first place: but he may retain a rateable part or proportionable deduction from every legacy, except only in some certain cases; such as, when a specific legacy is bequeathed, as a ring, or a horse: likewise where a father bequeaths something to his daughters, for their dowers, or towards their marriage; or when he bequeaths any thing in satisfaction or recompence of some injury which he has done, or of goods ill gotten; for rather than such legacies shall be diminished, all other general legacies consisting in quantity shall remain wholly unsatisfied<sup>d</sup>.

Where there are divers executors named in a will, and some of them refuse to act, and others of them prove the testament; those who refuse may afterwards administer at

<sup>a</sup> Barnadiston, 435. 2 P. W. 25. 2 Atkins, 171.  
155. 1 Ought, 370, 371.

<sup>c</sup> 2 P. W. 619.

<sup>b</sup> 2 Cha. C2.

<sup>d</sup> Swinb. on Wills, 227.

their pleasure, notwithstanding their refusal before the ordinary. But it is generally held, that they must come during the life-time of the acting executor, though it is said, that such shall be preferred after the death of the executor, before any other executor made by a co-executor. Where there are more than one executor named in a will, and one only proves the testament, and afterwards the others administer, the form of proceeding is as follows: The first that comes in takes probate in the usual form; with reservation to the rest: afterwards if another comes in, he also is to be sworn in the usual manner; and an engrossment of the original will is to be annexed to such probate, in the same manner as the first. And in the second grant, such first grant is to be recited; and so on if there are more that come in afterwards<sup>a</sup>. If a man makes two executors and dies, and one of them proves the will in the name of both, against the will of the other; this is not any administration for him who did not consent to the probate, but he may plead *ne unque executor*; for the probate does not make him executor, if he does not administer<sup>b</sup>. Swinburne says<sup>c</sup>, when all the executors named in a testament refuse, it is lawful for the bishop or ordinary to commit administration; and to annex the will to the letters of administration; and the administrators shall have action; and may administer the goods of the deceased, as if he had died intestate; and their authority or act done is good and effectual in law in the mean time, until the executors undertake the executorship; for then the ordinary may revoke the administration before by him committed. The refusal to take upon him the executorship, cannot be by word only; but it must be entered and recorded in court<sup>d</sup>.

<sup>a</sup> Swinb. 444.<sup>b</sup> Salk. 311.<sup>c</sup> Burn's Ec. Law, art. Wills.<sup>d</sup> 1 Roll. Abr. 918.

; Page 380, 383.

<sup>k</sup> 1 Roll. Abr. 907.

*Actions given to Executors and Administrators.*

**E**Xecutors shall have a writ of account, and the same action and process in such writ as the testator might have had if he had lived <sup>1</sup>. And the same power is given to executors to recover damages by trespass committed against the testator in his life-time <sup>m</sup>. And executors of executors are invested with the same power, and an action of debt may be brought to recover arrears of rent that becomes due in right of the testator; and an action upon the case is allowed to an executor to recover arrears of rent due upon an estate held for life by the testator; and if he dies upon the day on which the sum was made payable, the whole; or if before such day, then a proportion of the rent according to the time such tenant for life lived, of the last year or quarter of a year; or other time in which the said rent was growing due; making all just allowances, or a proportionable part thereof respectively <sup>n</sup>. All the executors represent the person of the testator, and therefore all suits to recover the testator's effects must be preferred in their joint names, whether all administer or not; but in suits commenced against them, only such as have administered need be named <sup>o</sup>. If a man bequeath corn growing, or goods, unto one; and a stranger will not suffer the executor to perform the testament; he shall sue the stranger in the spiritual court for such legacy <sup>p</sup>.

The executor or administrator shall be allowed all reasonable expenses, as well in law suits, as for other honest purposes; and this reasonableness of expenses to be such, as

<sup>1</sup> 13 Edw. I. st. 1. c. 23.  
c. 5.

<sup>n</sup> 11 Geo. II. c. 19. s. 15.

<sup>m</sup> 4 Edw. III. c. 7.

<sup>o</sup> Went, 95.

<sup>p</sup> Swinb. 18.



that he may receive thereby neither profit nor loss <sup>q</sup>. Where an executor or administrator puts out money upon a real security, which at that time there was no reason to object to, and afterwards such security proves bad; he shall not be accountable for the loss <sup>r</sup>. So if the executor pay the assets into the hands of a banker his co-executor, whom the testator used to entrust with his money; after which the banker fails, the executor shall not be chargeable with the loss <sup>s</sup>. In all actions brought by executors or administrators upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life time, they shall pay no costs by any statute <sup>t</sup>. And as they are not to pay costs, so on the other hand they are not to be allowed any; because they are supposed to reimburse themselves any charges or expences they may have been at on account of the testator's or intestate's estate <sup>u</sup>.—On a question, whether an executor should be permitted to discontinue without payment of costs; Mr. Ashurst, for the plaintiff's executor, urged, that an executor should not pay costs in any instance except one, viz. where he had brought an action as executor, which he might have brought in his own name <sup>v</sup>.—The court were clear, that the giving an executor leave to discontinue, was a matter of discretion in the court, and that they ought not to give him such leave in any case where he had knowingly brought his action wrong, unless he would consent to pay costs <sup>w</sup>.

*Actions against Executors and Administrators.*

**WHERE** a devise is made of goods, if the executor will not deliver them to the devisee, he hath no remedy at the common law; for an action on the case will not lie

<sup>q</sup> Lindw. 178.      <sup>r</sup> 1 P. W. 141.      <sup>s</sup> 1 P. W. 243.      <sup>t</sup> 2 Bac. Ab. 446. Law of Execut. 462.      <sup>u</sup> 2 Atk. 108.      <sup>v</sup> Portman and Came, str. 682.      <sup>w</sup> Harris exec. against Hunt, 51. H. 4 Geo. III. 3 Bur. Manf. 14.

against an executor for a legacy, unless he promise to pay it upon good consideration; for legacies are only to be recovered in the spiritual court, or in the courts of equity <sup>x</sup>. And if a suit is instituted in the spiritual court, the devisee must obtain a citation against the executor of the testament to appear before the ordinary, to shew why he performs not the will of the testator <sup>y</sup>. And where certain goods in specie are given to a man by will, he cannot take them without the executor's leave; so if a term for years is given to a man, he cannot enter into the land without assent; for it may be the executor hath not assets besides to pay the testator's debts <sup>z</sup>. And even if a man bequeaths goods to another, which are in the custody of that other person; yet if he detain them from the executor, he not having assented to the legacy, the executor may have an action of detinue or trespass, or of trover after demand of the goods, against the said legatee <sup>a</sup>. But in the case of a devise of lands it is otherwise; for the devisee may enter without the assent of the executor; and if the heir at law should enter before him, the devisee may enter and eject him <sup>b</sup>. If a legacy is granted out of lands in fee-simple, this shall not be sued for in the spiritual court, but at common law. But if lands are devised to be sold for the payment of legacies; the land being sold, the suit for the distribution of the money may be in the spiritual court; for the money is personal, and assets in the hands of the executors <sup>c</sup>. But where a man devised that his executors should sell his lands, and out of the money which should be raised by such sale, gives a portion to his daughters; it hath been adjudged, that neither the land, nor the money, are testamentary, for it is not assets to satisfy debts, but a sum arising out of land, and

<sup>x</sup> 1 Sid. 46. Vin. tit. Actions, O. c. 7.  
Devise.

<sup>z</sup> Law of Exec. 262.

<sup>y</sup> Terms of the Law, art.

<sup>a</sup> Ib. 263.

<sup>b</sup> 1 Inst. 111.

<sup>c</sup> Cro. Car. 396.

appointed

appointed to special uses in way of equity, and not as a legacy, and therefore ~~not~~ to be sued for in the ecclesiastical court, but in a court of equity; and the ecclesiastical court cannot hold plea of a legacy in equity, but only where it is a legacy in law <sup>d</sup>. But where the testator devised leases to his eldest son, and that out of the same he should raise such a sum of money for portions for his daughters, who libelled in the spiritual court for their portions: It was adjudged, that this should not be accounted as a rent issuing out of the lands, but as a testamentary legacy, and to be recovered in that court <sup>e</sup>. It is said, that where the ecclesiastical court and a court of equity have a concurrent jurisdiction, which ever is first possessed of the cause, has a right to proceed: and the same of all other courts. But where a husband has sued in the spiritual court for a legacy bequeathed his wife, the court of chancery has granted an injunction to stay proceedings; because the spiritual court cannot oblige him to make an adequate settlement on her <sup>f</sup>. For the same reason, where a personal legacy was given to an infant; it was held that the same is more properly cognizable in chancery than in the ecclesiastical court. And if the matter had proceeded to sentence in the ecclesiastical court, yet it was proper to come into chancery for the executor's indemnity; for in the chancery, legatees are to give security for the money, but not in the spiritual court; and the chancery will see the money put out for the children <sup>g</sup>. Legacies may be recovered in the spiritual court against an administrator, with the will annexed; or against an executor of his own wrong <sup>h</sup>. An executor may, in some cases, be compelled to give security to pay a legacy; as where 1000*l.* was devised to a person to be paid at the age of twenty-one years; and upon a bill exhibited against the executor suggesting a *devastavit*,

<sup>d</sup> Cro. Car. 396.<sup>e</sup> 1 Bulst. 153.<sup>f</sup> Prec. Chan. 546.<sup>g</sup> 1 Vern. 26.<sup>h</sup> 1 Roll. Ab. 910?

and praying that he might give security to pay the legacy when due, it was decreed accordingly <sup>l</sup>. The testator devised 800*l.* to an infant, to be paid by his executor when the said infant should attain to the age of twenty-one years. The infant, by his guardian, exhibited a bill, that the executor might give security for the payment of the money. And so it was decreed <sup>k</sup>.

Where there are divers executors, and some of them are dead, the legatee must sue the surviving executors, and not the executors or administrators of those that are dead. And if all the executors are dead, he must sue the executors or administrators of him who died last, and not the executors or administrators of the rest: and the reason is, because it is presumed that the goods of the deceased not administered by the other executors, remain with the surviving executor; or if they did not, it was thought his own default; because when the other executors were dead, he might and ought to have proceeded against their executors or administrators for restitution of the goods not administered <sup>l</sup>.

If the testament is duly proved before the ordinary, the execution or administration of any goods shall not be committed but to such as are able, and if need, be shall give security to render a just account of their administration when they shall be duly required by the ordinary <sup>m</sup>. And it is said, that the ordinary may remove the executor appointed by the testator from the administration, where he cannot give security for a due account; or for any other just cause. But Holt, chief justice, and the rest of the judges of the court of King's Bench determined; that when a man is

<sup>l</sup> 1 Cha. Ca. 121.

<sup>k</sup> Swinb. 40. Law of Execut. 187.

<sup>l</sup> Ought. 364.

<sup>m</sup> Lindw. 177. Swinb. 451.

made executor, no body can add qualifications to him, other than those which the testator has imposed; but he shall be who, and in what manner, the testator shall judge proper. The executor has besides a 'temporal right, of which he is barred by the refusal of the probate, because he cannot before probate sue in Westminster Hall. And the court further observed in the same cause, that there were no precedents in the canon law to warrant the demand of security from the executor; and the practice has always been contrary. And if any cases happen in which equity may be requisite, there is another channel here where it runs; without resorting to the spiritual court, namely, the chancery <sup>b</sup>. But where the executor was under the age of seventeen years, the court allowed a bond given by the administrator, with the will annexed, during the minority of the executor, to be good at common law, and not to be obtained by coercion <sup>c</sup>.

If the executor die intestate, the testator also from that time shall be deemed intestate, and administration may in this case be committed of the goods not administered <sup>d</sup>; but if the executor makes an executor and dies, his executor shall be executor to the first testator; in case there is no joint executor <sup>e</sup>. And such an one has a right to all the profits, and is liable to all the charge that the first executor had, or was subject to. But the one testator's goods shall not stand charged with the other testator's debts, but each for his own <sup>f</sup>.

Co-executors being in law but as one person, the act of one is the act of all; and the possession of one is accounted

<sup>b</sup> Case of the King and Sir Richard Rains, M. 40 W. 111. Lord Raym. 961. <sup>c</sup> Str. 1437. <sup>d</sup> Swinb. 382. <sup>e</sup> 1 Hall. Ab. 497. <sup>f</sup> Swinb. 329.

the possession of all, and the payment of debts by or to one of them is the payment of or to all of them : and the sale or gift of the testator's goods by one, is the sale or gift by all : and likewise a release before judgment of one of them, is a release of all<sup>s</sup>. One executor cannot regularly sue a co-executor in any matter relating to the testator's will ; or that is within the power, interest, duty, or office of an executor<sup>t</sup>.

It seems to be now settled, that where a man makes two executors, and devises to them the residue of his goods after debts and legacies paid, and one of them dies before a division of the surplus, that the survivor shall have the whole<sup>u</sup>. —A legacy of 125l. was given to the plaintiff, being but ten years old, and at that age was paid to the plaintiff's father, who died insolvent. This was held by the lord-keeper to be good payment : but the attorney general urged very much the ill consequence of this ; for the law must be the same if it were 1000l. and extends to other cases of like nature, not to legacies only ; and said that the executor ought to have sued in this court to have paid it. To which the lord-keeper observed, that it might be so where the legacy would bear the charge of it, but not otherwise. *But the executor having taken a bond to save him harmless, it was decreed that he should pay it over again, for he had paid it at his own peril<sup>v</sup>.* But lord ch. Cowper said, that the master of the rolls, who had longer experience than himself, would never allow a child's legacy to be paid to the father or mother upon any security whatever, because of the strife it might occasion in a family<sup>w</sup>. —A legacy of 100l. was devised to an infant of about ten years of age ; the executor paid this legacy to the father, and took his receipt for

<sup>s</sup> Swinb. 328.<sup>t</sup> 2 Bac. Abr. 396.<sup>u</sup> 2 Lev. 209. 1 Vern. 482.<sup>v</sup> Case of Holloway and Collins, H. 26 & 27 Car. II. 1 Chan. Ca. 245.<sup>w</sup> In the Case of Strickland and Hudson, E. 7 Ann. 3 Chan. Ca. 168.

it. When the infant came of age, his father told him he had received the legacy, but could not pay it him immediately, and said he would not have him trouble the executor, for he would give it him. The son rested satisfied with this for about fourteen or fifteen years; and his father and he having carried on a joint trade together became bankrupts. This legacy of 100*l.* being among other things assigned by the commissioners for the benefit of the creditors, the assignees brought a bill against the executor, for an account and payment of this legacy: the defendant insisted on the extreme hardship of his case, if he should be obliged to pay the legacy over again; that he had justly paid it to the father, whilst he was in good circumstances, and that if application had been made sooner, he might have had his remedy over against the father; that the father was by nature guardian to his child; and that formerly payment to him was allowed to be good. The lord ch. Cowper said, that if the father had not made the son such promise of recompence, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of the father drew him to forbear applying to the executor sooner; and since the father had not, and could not now make good his promise, being a bankrupt, the reason of the son's forbearance was at an end: he thought the rule of the court of Chancery in not suffering parents to receive their children's legacies, was founded on very good reason; and therefore, lest hereafter this case should be cited as a precedent, when the circumstances attending it might be forgotten, and to discountenance and deter others from paying such legacies to the parents, (though he did not deny the hardship of that particular case) he decreed for the plaintiffs against the executor <sup>x</sup>.—Mrs. Paget by her will bequeathed 100*l.* to each of the three children of Mr. Philips, and made the defendant her exe-

<sup>x</sup> Case of Doyley and Tollferry, M. 1715; 3 Bac. Abr. 484. 1 Ab. Eq. 300.

cutor, leaving him the bulk of her estate, provided he paid the three legacies of 100l. within a year after her death, pursuant to her will. The defendant within the time pays into the children's own hands their legacies. The eldest of them was sixteen years old at the time; the next fourteen; and the youngest nine only. And in his answer he denied that he knew this money ever came to the father's hands. The children brought their bill against the defendant to be paid their several legacies, suggesting that the father had embezzled the money paid by the defendant during their infancy, and is insolvent: and that this was a fraudulent payment to the father, and therefore it must be paid over again. Lord Hardwicke asked the council for the defendant if they knew any instance where an executor paying so large a sum as 100l. into the hands of minors, had been allowed such payments: indeed in cases where the legacies have been very small, the payment has been allowed by the court. But in this case, notwithstanding the sum is above 100l. yet as the payment by the executor to the children themselves is so fully proved, and not at all controverted by the plaintiffs, and their losing the benefit of it is owing to the negligence and insolvency of the father, his lordship said he would not strain the rules of that court to make an executor pay it over again: especially as he made this payment to save a forfeiture; it being an express condition, of his own taking under the will, that he should discharge their legacies within a year after Mrs. Paget's death. But the next day the lord ch. said, that upon looking into the cases, he found this a very doubtful point, and unless the defendant would agree to give the plaintiffs something, he would not determine it without taking time for further consideration. The defendant upon this recommendation of the court, agreed to pay in 50l. to be divided between the three plaintiffs, and each side were to abide by their costs. And it was made part of the



the decree that the 50l. was paid by the consent of all parties. And his lordship directed each of the plaintiffs upon receiving their respective shares, to release the legacies under the will. The case of Doyley and Tollferry [the last cited case] his lordship said must have had some other circumstances; for the rule is laid down too strictly, that in all cases where executors pay infant's legacies to their fathers, in order to deter executors from such payments, it shall be paid over again<sup>y</sup>.

On an action of debt against two executors, if they plead severally by several attornies *fully administered*; and the jury find that the one has assets, and the other has not any assets, the judgment shall be only against him who is found to have assets, and the other who had not assets shall go quit<sup>z</sup>.

*Surplus or Residuum to Executors.*

**W**HERE there is an express legacy given to an executor, and no devise of the surplus, he shall not take it to himself, but be only a trustee for the next of kin, and the same shall be disposed of according to the statute of distributions. But where no express legacy is given to the executor the surplus shall go to him, if not otherwise devised in the will<sup>a</sup>.—A man devised particular legacies to his children and grandchildren; and 10l. a piece to his executors for their care. The surplus of the personal estate was 5000l. and upwards. The question was whether the surplus should be a trust for the children, or go to the executors; and it was decreed a trust for children. And the decree was affirmed in the house of lords<sup>b</sup>.—General Pultney by his will

<sup>y</sup> Case of Philips and Paget, Nov. 11, 1740, 2 Atk. 80.

<sup>z</sup> 1 Roll.

Ab. 929.

<sup>a</sup> Law of Test. 416, 417.

<sup>b</sup> Case of Southcot and Wat-

son, June 9, 1745.

gave, in the first part of it to Mrs. Watson an annuity of 400l. and in the last clause gives her all his household goods and furniture, (three pictures excepted) and all his plate, linen, watches, jewels, and cloathes whatsoever, and declared her sole executrix. The bill was brought for an account of such part of the personal estate as is undisposed of; and for a distribution. By lord Hardwicke. The bequest of the specific things to Mrs. Watson excludes her from the residue<sup>c</sup>.—The testator gave a pecuniary legacy to A, and another of a different value to B, both infants, and made them his executors. The question was as to the residue of his personal estate, whether it should result to his next of kin, or go to his executors? By Hardwicke, lord chan. though the law casts the whole personal estate upon the executor; yet as a will is to be construed chiefly according to the intention of the testator, if it appears manifestly his design that the executor shall not have it, it shall be distributed by this court. As, where a specific legacy is given to an executor, he shall not have the residue; as it would be absurd to think that the testator after he had given him what he thought convenient, should also intend to give him the whole residue, which would include the particular legacy. Yet in many cases this construction may be improper; and therefore the rule of law has been suffered to take place. As in the case of Griffiths and Rogers, where the executrix had a specific legacy of ten books. And in the case of Jones and Westcomb, (Prec. Chan. 316) where a man possessed of a long term, devised it to his wife for life, and after her death to the

<sup>c</sup> 3 Atk. 226. But in an appeal brought from the court of Chancery before the house of Lords the present sessions, Winifred Lawson, widow, appellant, and — Lawson, Esq; respondent, the question was, Whether an executor is entitled to the residue of the personal estate, after paying debts and legacies. Lord Mansfield was clearly of opinion that they were, unless in such cases where the intention of the testator is apparently otherwise, or where fraud is apparent, or strongly to be presumed, and he took into consideration this decree of lord Hardwicke. The decree of the court of Chancery was reversed.

child

child she was then enſient with, and made her executrix. This bequeſt did not bar her right to the ſurplus of his perſonal eſtate, for it was neceſſary to deviſe the term to her ſpecifically to render the limitation to the child good. In the preſent caſe, not to mention that it is improbable the teſtator would have made theſe perſons who are infants his executors, merely for the purpoſe of diſtributing his perſonal eſtate, without any benefit to themſelves; it was very proper he ſhould give them theſe legacies, although he intended they ſhould after have the reſidue; for they do not take the legacies as they will the reſidue; for this they are entitled to jointly and equally, and the ſurvivor will take the whole. But the legacies are unequal in value, and their intereſt in them different and ſeparate. And it cannot be inferred that the reſidue includes the particular legacies; for as they are bequeathed, the legatees are entitled to them in ſeveralty, and with different intereſts; whereas if he had not ſeparated them, they would have devolved jointly, and otherwiſe than he intended they ſhould. And he decreed the reſidue to the executors<sup>d</sup>,

*Of Adminiſtrators.*

**I**N ancient times if a perſon made no diſpoſition of his property ſo far as he had a right of bequeathing it, the king was entitled to ſeize upon his goods, as the *parens patriæ*, and general trustee of the kingdom<sup>e</sup>. This prerogative the king continued to exerciſe for ſome time by his own miniſters of juſtice; and probably in the county court, where matters of all kinds were determined. And there are ſeveral inſtances in Madox's hiſtory of the Exchequer, where the king iſſued a mandate to his officers to attach the goods of divers perſons who died inteſtate. And the ſame prerogative was granted from the crown as a franchise to many lords of manors, and others, who have at this day a preſcriptive right to grant adminiſtration to their inteſtate tenants

<sup>d</sup> Caſe of Blinckhorn and Feaſt, Oct. 24, 1750.

<sup>e</sup> 9 Rep. 38.

and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition. Afterwards the crown in favour of the church, invested the prelates with this branch of the prerogative, which was done, said Perkins, <sup>f</sup> because it was intended by the law, that spiritual men are of better conscience than laymen; and that they had more knowledge what would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, alien, or sell them at his will, and dispose of the money *in pious uses*. And if he applied it otherwise he abused the confidence the law reposed in him <sup>g</sup>. So that properly the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated *pious* <sup>h</sup>. And as he had thus the disposition of intestate's effects, the probate of wills of course followed. For it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby. The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and their own consciences for their conduct. But to what a length of iniquity the holy ecclesiastics carried the abuse of their trust most evidently appears from a gloss or comment of pope Innocent IV. written about the year 1250 <sup>i</sup>, wherein he lays it down for established canon law,

<sup>f</sup> On the laws of England, sect. 486.

Finch, 173.4.

<sup>g</sup> Plowd. 277.

<sup>i</sup> In Decretal, b. 5. t. 3. c. 42.

that "*in Britannia tertia pars bonorum decedentium ab intestato, in opus ecclesiæ et pauperum dispensanda est.*" Thus the Popish clergy took to themselves, under the name of the church and poor, the whole residuary estate of the deceased, after the *partes rationabiles*, or two-thirds, vesting in the wife and children were deducted. And a greater share if the deceased died without a wife, or without a child. And the whole of his effects if neither survived him, and these they appropriated without paying even his lawful debts, or other charges thereon. To redress a national evil of such enormity it was enacted, that the ordinary should be bound to pay the debts of the intestate, so far as his goods extended, in the same manner that executors were bound in cases where the deceased left a will<sup>k</sup>. A use more truly pious than any requiem or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the residuum after paying of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependants, and therefore the statute 31 Edw. III. c. 11, provides, that in case of intestacy the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, which administrators are put upon the same footing with regard to suits, and to accounting as executors appointed by will, as has been already shewn. And this is the original of administrators as they at present stand; who are only the officers of the ordinary appointed by him in

<sup>k</sup> West. 2. 13 Edw. I. c. 19.

purfuance of this ftatute, which fingles out the next and moft lawful friend of the intefstate. By which is underftood to be meant, the next of blood that is under no legal difability. The ftatute 21 Hen. VIII. c. 5. enlarges a little more the power of the ecclefiastical judge; and permits him to grant adminiftration *either* to the widow, or the next of kin, or to both of them at his own difcretion: and where two or more perfons are in the fame degree of kindred, it gives the ordinary his election to accept which ever he pleafes<sup>l</sup>. The perfon to whom adminiftration is granted may refuse to take it upon him; and the ordinary has not power to compel him to accept it. If there are two or more adminiftrators, a fale or release of the effects of the deceased muft be made to all jointly; for the act of one of them is not good againft the reft, as in the cafe of executors<sup>m</sup>.

Letters of adminiftration are not ufually iffued until after the expiration of fourteen days from the death of the intefstate. Unless for fpecial caufe, as, that the goods will otherwife perifh, or the like, the judge fhall fee fit to decree them fooner<sup>n</sup>. The ordinary cannot repeal an adminiftration at his pleafure<sup>o</sup>. But it may be repealed though not arbitrarily, where there is juft caufe for fo doing, of which the temporal courts are to judge; as if the adminiftrator fhould become lunatic or the like. So if the next of kin at the time of the death of the intefstate happen to be incapable of adminiftering, by reafon of attain, or excommunication; and the ordinary commit it to another; if he afterwards becomes capable, the ordinary may repeal the firft adminiftration, and commit it to the next of kin<sup>p</sup>. An adminiftration may be repealed without any fentence of revocation to be

<sup>l</sup> Blackft. b. II. c. 52.

323.

<sup>o</sup> Swinb. 381.

<sup>m</sup> Swinb. 1384. 1 Atk. 460.

<sup>p</sup> Gibb. 479.

<sup>n</sup> 1 Ough,

given in any spiritual court or otherwise; as, by granting a new administration<sup>q</sup>. Sir George Sands administered to his son, and afterwards a woman that pretended to be the wife of the deceased sued for a repeal; but a prohibition was granted; because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father<sup>r</sup>.—Walker Wildon died intestate, leaving Ann his wife, and Amphillis his sister. The sister upon the common oath, that she believed he died intestate, without wife or child, obtained administration. And in a suit to repeal it, as obtained by surprize, it appeared to be the practice of the court, never to grant it to the next of kin until the wife is cited. The sister moved for a prohibition, and insisted, that the ordinary had executed his authority. But the court held that the ordinary could not be said to have exercised his authority, having never had an opportunity to make the election which the statutes gives him a power of doing<sup>s</sup>. That it was incident to every court to rectify mistakes they were led into by the misrepresentation of the parties; that if there was no surprize, (of which the court below was the judge) there ought to be a prohibition, because then the administration will be duly and regularly granted: but here was a plain surprize, and therefore they denied a prohibition<sup>t</sup>.

Where administration is granted during the minority of divers executors, he that comes first of age shall prove the will, and the administration then ceases<sup>u</sup>. So if a man appoints by his will two executors; one of the age of seventeen, and the other under; administration during the mino-

<sup>q</sup> 1 And. 303. See the Case of Haydon and Gould, pag: 48.

Raym. 93.

<sup>s</sup> 21 Hen. VIII. c. 5.

Wildon, Str. 911,

<sup>u</sup> Law of Test. 474.

<sup>r</sup> Lord  
<sup>t</sup> T. 5 Geo. II. Harrison and

rity of him that is under age is void ; because he that is of the age of seventeen may execute the will <sup>v</sup>. And it is said, that the ordinary may grant administration during the minority of an infant, to whom he pleases. For the next of kin in respect to administration only concerns an intestate, and not the person who is employed for the infant until he comes of age <sup>w</sup>. If a feme-covert, as next of kin, has a right to administer; the administration ought not to be granted to the husband and wife; for then if she should die before him; he would continue administrator against the meaning of the act <sup>x</sup>. But it was said, that if it had been granted to them only during the coverture, perhaps it might have been good ; because if granted to the wife only, the husband might, during the coverture, have administered <sup>y</sup>. If the wife as a residuary legatee, hath a right to take administration, but refuses, and prays it may be granted to another and not to her husband ; yet it may be granted to her husband <sup>z</sup>. If none of the kindred will take administration, then it shall be granted to those who shall desire it, and if none will take it, the ordinary may grant letters *ad colligendum bona defuncti* ; and thereby take the goods of the deceased into his own hands, wherewith he is to pay debts and legacies, if a will or codicil is produced, so far as the goods will reach, for which himself becomes liable in law, as other executors or administrators <sup>a</sup>. If administration is granted to two, and one dies, yet the administration does not cease ; for it is not like a letter of attorney to two, whereby the death of one the authority ceaseth, but is rather an office ; and administrators are enabled to bring actions in their own names ; they come in the place of executors, and

<sup>v</sup> 1 Brownl. 46.

<sup>w</sup> Fitz Gib. 163.

<sup>x</sup> Case of Brown and Wood,

H. 23. Car. I. Style, 74.

<sup>y</sup> Aleyn, 36.

<sup>z</sup> Case of Vantbrienen

Fitz Gib. 203.

<sup>a</sup> Swinb. 448.

therefore



therefore the office survives <sup>b</sup>. When an administrator hath judgment and dies, his executors (as such) may not sue execution of the same judgment, for none shall have execution of this judgment, but he who shall be subject to the payment of the debts of the first intestate <sup>c</sup>.

*Administration pendente lite.*

**A**N administration appointed *pendente lite* may maintain an action to recover the debts of the testator. And on a dispute in the ecclesiastical court concerning a probate; the court of chancery does not interfere to appoint a receiver of the personal estate <sup>d</sup>. Administrators may have action to demand and recover as executors, the debts due to the personal intestate <sup>e</sup>.

*Distribution of Intestate's Effects.*

Ormerly an administrator was not compellable to distribute the effects of the deceased; and an husband at this day has a right to administer to the effects of his wife, and thereby to acquire an absolute right in them, to the entire exclusion of all her relations. But the statutes of distributions <sup>f</sup> has determined with great precision what shall be the rule with respect to the disposal of the surplusage of intestates effects, feme-coverts alone excepted; for thereby it is enacted, that one third shall go to the widow of the intestate, and the residue in equal proportions to his children; or if dead, to their representatives: if no widow the whole shall go to the children; if neither widow nor children, the whole shall be distributed amongst the next of

<sup>b</sup> 2 Vern. 514.

<sup>c</sup> Brudenell's Case, 5 Co. 9.

<sup>d</sup> 1 Vezey, 324.

<sup>e</sup> 31 Edw. III. st. 1. c. 11.

<sup>f</sup> 22 & 23 Car. II. c. 10. sect. 25.

kin in equal degree; and their representatives; but no representatives, are admitted among collaterals farther than the children of the intestate's brothers and sisters <sup>g</sup>. The next of kindred here referred to, are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration; and therefore by this statute, the mother as well as the father succeeds to all the personal effects of her children, who died intestate without will or issue; in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 James II. c. 17. if the father is dead, and any of the children die intestate without wife or issue, in the life-time of the mother, she and each of the surviving children, or their representatives shall divide his effects in equal portions. This statute of distributions bears an obvious and striking resemblance to the ancient English law *de rationabili parte bonorum* already spoken of <sup>h</sup>. And which Sir Edward Coke himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding upon the administrator or executor, in the case of either a total or a partial intestacy <sup>i</sup>. By the same statute, directions are given that no child of the intestate (except his heir at law) on whom he settled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters. But if the estates so given them by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as would make them equal <sup>k</sup>.—The right to the distributive share vests immediately on the intestate's death, although distribution is not to be made until after one year <sup>l</sup>. If ad-

<sup>g</sup> Raym. 496, 571.  
c. 32.

<sup>h</sup> Page 191.

<sup>i</sup> 2 Inst. 33.

<sup>k</sup> Blackst. b. II.

<sup>l</sup> Grice and Grice, H. 1708.

<sup>3</sup> P. W. 49.

ministration is denied by the ordinary to the person who is entitled to it, a mandamus will go from the temporal courts to grant it, except a controversy is depending whether there is a will or not <sup>m</sup>.

*Of the Probate of Wills.*

**T**HE jurisdiction of the prerogative court is confined merely to probates and administrations. In the probate of wills, as well as in the granting of letters of administration; if a will is forged; if a will of a personal estate is fraudulently obtained; if the prerogative court has granted a probate, it is not open to a court of common law. Neither is a court of equity to enter into the fraud made use of in obtaining the will; or the forgery committed upon the testator; and the seal of the ordinary in any thing within his jurisdiction is a bar to all temporal courts; and they cannot proceed until the probate is repealed. But the case is different if the seal of the ordinary can be proved to be forged; in such a case relief may be granted by the temporal courts.—A probate of a forged will was obtained in the ecclesiastical court; by a fraud upon the plaintiff in procuring his consent to such probate; and by the like means a decree in the court of Exchequer was obtained to establish the said will as to the real estate. Upon these facts being disclosed, and a bill filed in chancery, an issue was directed to try the validity of the will at law; which the jury found to be forged. And the question was, what could now be done? Especially with respect to the personal estate? And the decree in the Exchequer likewise stood in the way with respect to the real estate. Lord Hardwicke said, that as to the decree in the Exchequer, the same having been obtained by

<sup>m</sup> Gibb. 478.

fraud, though he could not set it aside, yet he could decree, that no use should be made of it : and as to the personality, undoubtedly the jurisdiction of wills of personal estate belongs to the ecclesiastical court, according to the rules of which court it must be tried ; notwithstanding the will is found forged by a jury at common law, upon examination of witnesses, which is sometimes unfortunate, causing different determinations, nor can this court help it. But in the present case his lordship decreed, that the defendant should consent in the ecclesiastical court to a revocation of the probate ; and though he would not then decree the defendant a trustee of the personal estate, lest it might create some jealousy of infringing on the ecclesiastical court, yet he decreed an account of the personal estate to be taken ; and the same to be paid into the Bank for the benefit of the parties entitled <sup>n</sup>. And it has been contended, that if a forged will is proved before the ordinary, and a probate obtained, it is a bar to a criminal prosecution for the forgery, as long as the probate remains unrepealed ; and in the case of the king against Vincent, an indictment at the Old Bailey for forging a will relating to a personal estate, and on the trial a forgery was proved, but the prisoner's council produced a probate that was held to be conclusive evidence in support of the will <sup>o</sup>. But this doctrine was overruled by the unanimous opinion of the judges on the trial of the duchess dowager of Kingston, wherein this point came to be pleaded in bar to the proceedings in that cause.

But though a will gained by fraud, and proved in the spiritual court, cannot be controverted in equity, yet if the

<sup>n</sup> Case of Barnesley and Powel, August 5, 1748. 2 Vez. 119.

<sup>o</sup> M. 8 Geo. I. Str. 481.

party claiming under such a will comes for equity into the court of Chancery, he shall not have it<sup>r</sup>.

Where the power of granting probates of wills and administrations of intestates effects are rights inherent in manors; and where the lord of the manor hath the probate of testaments within his manor, if a will within his jurisdiction is proved in the ecclesiastical court, a prohibition will lie<sup>q</sup>.

### *Of a Caveat.*

**A** Caveat is a caution entered in the spiritual court to stop probates and administrations from being granted without the knowledge of the party that enters it.

### *Of the Duty of Executors and Administrators to deliver in an Account.*

**W**HEN executors or administrators have fully discharged all the duties of their office, they are bound by their oath to make a true and perfect account to the ordinary whenever they shall be thereunto legally called<sup>r</sup>. And such account must be passed by the same judge, or his surrogate, or successor, as granted the administration. But they are not compellable to make any account to the creditors or legatees extra-judicially. But an executor may expect an account from his co-executor extra-judicially. The creditors and legatees of the testator, as well as all persons having interest, are to be cited to be present at the making of the ~~account~~ <sup>account</sup>; otherwise an account made in their absence, if

<sup>r</sup> 2 Vern. 76.

<sup>q</sup> 2 Bac. Ab. 402. See page 255.

<sup>r</sup> Swinb. 466.

they were not called, is not prejudicial to them<sup>1</sup>. If after due examination the ordinary finds the same to be true and perfect, and pronounces for the validity thereof, the executor or administrator ought to be acquitted and discharged from further molestation and suits, and cannot be called upon again by the ordinary<sup>2</sup>. A party praying an account and having an interest, is not to be condemned in costs unless he objects to the account produced, and fails in his proof<sup>3</sup>.

<sup>1</sup> Swinb. 468.

<sup>2</sup> Ibid. 469.

<sup>3</sup> Floyer's Pract. Practice, 38.

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T H E  
L A W S  
R E S P E C T I N G  
W O M E N.

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B O O K T H E T H I R D.

*Of the Crimes committable by, and with Women; and  
their Punishments.*

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C H A P. I.

*Of forcible Abduction and Marriage.*

**T**O prove a man guilty of stealing an heiress, the indictment must set forth that the taking was for lucre<sup>a</sup>. In proof of which must be shewn, that a woman so taken away has substance, either real or personal; or is an heir apparent. She must be likewise proved to have been taken away against her will: and lastly, it must

<sup>a</sup> See page 7.

be proved that she was afterwards married or defiled, either to such misdoer, or by his consent to others<sup>b</sup>. Such person, and all his accessaries, are deemed principal felons<sup>c</sup>, and they are not entitled to the benefit of clergy; accessaries after the fact only excepted<sup>d</sup>. And though possibly the marriage or defilement after her forcible taking away, may be by her consent, she being wrought upon to give it by persuasion and management; yet such subsequent consent does not abate the felony, if the first taking away was against her will; and so *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and is forced against her will, she may from that time be said to be taken against her will, as properly as if she had never given any consent at all. For till the force was put upon her she was in her own power. It is held that a woman thus taken away and married, may be sworn and give evidence against the offender, though he is her husband *de facto*; contrary to the general rule of law, because he is no husband *de jure*, in case the actual marriage was against her will<sup>e</sup>. In cases indeed where the actual marriage is good by the consent of the inveigled woman obtained after her forcible abduction, Sir Matt. Hale seems to question how far her evidence should be allowed: but other authorities seem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient in his crime, should by a forced construction of law be made use of to stop the mouth of the most material witness against him<sup>f</sup>.—An indictment was laid against lady Fulwood, Roger Fulwood, and divers others, for violently, and with force, and against

<sup>b</sup> 1 Hawk. 209. 1 —, 140. 1 Hale, 660.

<sup>c</sup> 2 Hep. V. H. c. 2.

<sup>d</sup> 39 Eliz. c. 9.

<sup>e</sup> 1 H. P. C. 661.

<sup>f</sup> State Trials, V. 455. 3 Keb.

793. Cro. Car. 488.



her will, taking away Sarah Cock, a maid, who had a portion of 1300l. by the said Roger, by procurement of the lady ; and carrying the said Sarah Cock to the church of St. Saviour's, Southwark, and there marrying her. Several witnesses proved in behalf of the prisoners, that the girl was willing to marry him, and appointed a taylor to make her a gown ; and was found in bed with him : but the wife made oath that she did it through fear of his threats, and that she knew not what she did. It appeared that the taking was for lucre ; and she being on the same day married, shews the caption to be with an intent to marry her : and the court were of opinion, that the taking being unlawful, and against her will, though the marriage was with her will, yet it is felony within the statute ; and although this was not a marriage *de jure*, because she was in such fear that she knew not what she answered or did ; yet it is a marriage *de facto*, and judgment was given that they should be hanged<sup>a</sup>.—Swendfen and others were indicted for forcibly taking and marrying Miss P. R. an heiress, It appeared that he had procured her and her aunt to be arrested on a sham action ; and that he married Miss P. R. whilst she was under that restraint. It was proved also that she had before that time expressed herself desirous of marrying him, and at the time of the marriage consented to it ; yet because she was not privy to the contrivance of the arrest, or met him then by consent, but he married her when she was under that force, the court held that her subsequent consent was not to be regarded, and that the marriage should be taken to be the effect of force ; he was therefore found guilty of the felony of which he stood indicted, and condemned and executed for the same<sup>b</sup>.

An inferior degree of the same kind of offence, but not attended with force, is the unlawfully conveying or taking

Baron & Feme, 446:

<sup>b</sup> 6 Mod. 101.

away any woman child unmarried, (which is held to extend to illegitimate children) under the age of sixteen years, without the will of her father, mother, guardians, or governors, and out of their possession. Such shall be imprisoned two years, and fined at the discretion of the court. And if he deflowers such maid, or woman child; or without the consent of parents, or others invested with legal authority, contracts matrimony with her, he shall be imprisoned five years, or fined at the discretion of the court. And she herself shall forfeit all her lands to her next of kin, during the life of such husband, if she be above the age of twelve years<sup>1</sup>. By which latter clause the mercenary views which generally instigated to such stolen marriages are effectually baffled.—The king against Bastian, father, and son, indictment for taking M. out of the custody of C, her guardian, being under the age of sixteen years, against the will of the said guardian. It appeared upon the evidence that the father of the infant being a freeman of London, made his will, and devised the custody of his daughter to the said C, and died, she being then in the country, The guardian obtained a warrant from the lord mayor of London, to take her into his custody, and she was thereupon taken, but rescued. The guardian afterwards obtained a warrant from the chief justice of the King's Bench, and took her, she being before married to Bastian the son. The court decreed that the defendants could not be found guilty of that indictment, because the infant was not in the possession of her guardian; for the father being a freeman of London, the devise as to his daughter was void, in relation to the disposal of her person; and the infant remained in the custody of the mayor and aldermen of London by the custom, and the indictment ought to have been for taking her out of their custody. Further,

this being a penal law, the person of the infant ought to be in the actual custody of him or them, in whom the indictment supposes the right. And moreover, that he out of whose possession she is supposed to have been taken, ought to have the mere right, otherwise it is not an offence against that statute. And another indictment might have been preferred for taking her out of the possession of her lawful guardians ; and the custom of London concerning orphans would then have been saved <sup>k</sup>.—Harwood was committed to Newgate by the court of orphans, for marrying an orphan without their license, and refusing to pay a fine of 40*l.* imposed upon him for his offence, or to give security ; and it was shewn on the return of the Habeas Corpus into the King's Bench, that the orphan's portion amounted to 800*l.* It was resolved unanimously by the court, that the prisoner should be remanded ; and that it is not material whether the offender be a freeman or not, or whether the marriage were in London, or a foreign county ; and that the court of Orphans might have a writ of *ravishment de gard*, in whatever county the orphan was ; but held that that court could not award process into a foreign county. They held also that the fine of 40*l.* was not unreasonable ; but as there did not appear to be any disparagement by the marriage, it was suggested by the court, that upon Harwood's submission, the court of Orphans would do well to remit the fine <sup>l</sup>.—One was fined for inveigling the son and heir of I. S. being but seventeen years of age, to marry the defendant's sister, when he was drunk <sup>m</sup>.—Information was exhibited by the attorney general against T. and others, for taking and marrying the sole daughter and heir apparent of H. of Kent, without the consent, and against the will of the father. It appeared in evidence, that T. was frequently at the house of the young

<sup>k</sup> Siderf. 362.<sup>l</sup> 1 Vent. 178.<sup>m</sup> Cro. Car. 557.

lady's father, and in her company, and that he there secretly contracted himself to her, she being then fifteen years of age: and that by agreement with the said T. she left her father's house, and met T. who came with horses from London to Kent, and brought her to London, where she was married to him. Upon which evidence the jury found them guilty. But the cause being prosecuted by the father and mother of the infant, who gave evidence against T. and his accomplices, they prayed the court that the fine and imprisonment might be moderated, they were therefore discharged out of prison upon bail<sup>n</sup>.—And it appears that the court of King's Bench fined one Story 100l. for taking away a young woman under sixteen years of age, out of her mother's custody: and two women who were assistants 50l. each: and all bound to the good behaviour, the first for five years, and the two others for one year<sup>o</sup>.—The mother of one Tibboth fearing that her only daughter might be stolen, entreated the lady Gower to take her into her family; who married her, being under the age of sixteen, to her son, without consent of the mother, who was also her guardian. But the estate being sued for by Hicks according to the tenor of the statute 4 & 5 P. & M. c. 8. It appeared to the court that the marriage was solemnized by a lawful minister, in the church, at a canonical hour, before several people, and while the church doors were open: the case was therefore found not to be within the design and intention of the statute; nor could the plaintiff prove any thing to make a forfeiture: whereupon he was nonsuit<sup>p</sup>.—The court granted an information against Cornforth and others, for taking away a natural daughter under sixteen years of age, who was under the care of her putative father, being of opi-

<sup>n</sup> Case of the King against Twisleton and others. Sid. 387.  
420. P Ibid.

<sup>o</sup> Gibb.

nion the case was within this statute<sup>9</sup>.—A man who stole his wife against her friend's consent, afterwards sued in equity for her portion ; but Egerton chancellor denied any relief, saying, *he that steals the flesh let him provide bread how he can ; he shall have no relief in equity*<sup>r</sup>.

## C H A P. II.

### *Of Fornication, or Lewdness.*

**L** EWDNESS of all kinds, or an illicit commerce between the sexes, is properly cognizable and punishable by the ecclesiastical law courts. But when such practices affect the good order and decorum of society, they become crimes properly cognizable by the civil magistrate. A person was indicted for open lewdness, in shewing his naked body in a balcony, and other misdemeanors ; and was fined 200 marks, imprisoned for a week, and bound to the good behaviour for three years<sup>s</sup>. The keeping a bawdy-house is considered as a common nuisance ; by drawing together dissolute and debauched persons of both sexes, to the great corruption of their manners, and disturbance of the public peace. Upon the same principle open and scandalous lewdness of every kind may be punished on indictment at the

<sup>9</sup> The King against Cornforth and others, H. 15, Geo. II. Ser. 1162.

<sup>r</sup> Baron & Feme, 449. The ingenious Mrs. Montague, in her Essay on the Genius of Shakespeare, observes, that in that poet's time "*the judges quibbled upon the bench.*" Egerton was chancellor in 1595.

<sup>s</sup> 1 Sid. 168.

common law ; the punishment for such crimes being fine and imprisonment : the measure of which the court in their discretion may appoint ; and also may superadd bodily chastisement and pillory on profligate offenders <sup>t</sup>.

Whilst the administration of government was assumed by the parliament and Cromwell, incest and wilful adultery were made capital crimes ; and keeping a brothel, or committing fornication if persisted in, on being a second time convicted of either, the offender was deemed guilty of felony without benefit of clergy. At the restoration the abhorrence conceived against these offences was a good deal relaxed ; therefore these severe statutes became obsolete. Now a woman cannot be indicted for being a bawd generally. The bare solicitation of chastity not being held indictable. And if any one is indicted for frequenting a bawdy-house, it must be given in evidence that he knew it to be such an one : and it must be expressly alledged that it is a bawdy-house, and not that it is suspected to be so. A wife may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy-house ; for this is an offence as to the government of the house, in which the wife has a principal share ; and also such an offence as may be generally presumed to be managed by the intrigues of her sex <sup>u</sup>. A constable has power, upon information given to him, that a man and woman are in adultery and fornication together ; or that a man and woman of evil report are gone to a suspected house together in the night, to take company with him, and if he finds them so, he may carry them before a justice, and find sureties of their good behaviour. For a man may be bound to his good behaviour for haunting

<sup>t</sup> Poph. 208. <sup>1</sup> Siderf. 168. <sup>3</sup> Inst. 205. <sup>1</sup> Hawk. 136, 197. <sup>1</sup> Salk. 382. <sup>u</sup> Wood's Inst. b. III. c. 3. <sup>1</sup> Hawk. 2.

bawdy-houses, as also for keeping bad women in his own house v.

It was formerly made high treason to marry without the king's licence, any of the king's children, whether males or females, sisters, aunts, nephews, or nieces; or to deflower any such female relation of the king's. Bare solicitation of the chastity of the queen, or princess royal, or advances made by themselves; or a woman marrying with the king who was not a virgin, without previously discovering to him her unchaste life, were high treasons; but the construction of these offences, with many others, into treasons ceased by stat. 1 Mary, c. 1.

*Punishment in Scotland for Fornication.*

**E**VERY nobleman guilty of the sin of fornication, for the first fault shall pay 400l. each baron 200l. other gentlemen and burgessees, 100l. every other person of inferior quality 10l. Scots money; and these penalties shall be doubled *toties quoties*, according to the relapses and degrees of the offence, and quality of the offenders. And the same penalties are enacted to be levied on the woman according to her rank, quality, and the degree of her offence, the one without prejudice of the other w.

*Punishment for having bastard Children.*

**I**F a single woman that is likely to be chargeable to the parish, declares herself with child, and that the same is likely to be born a bastard, and to be chargeable to the parish: or any single woman who shall be delivered of a bastard

v Dalt. c. 124. 2 Hawk. 61. 1 ——— 132.

w Burn's Jus. Appen.

child

child likely to be chargeable, who shall before a justice of peace charge any person with having gotten her with child; such justice, on application by the overseers, may cause such putative father to be apprehended and imprisoned, unless he gives security to indemnify the parish; or to appear at the next sessions, and to abide the order that shall be made there. But no justice of the peace has power to send for any woman before she be delivered, or sooner than one month after, to be examined concerning her pregnancy; nor shall compel her to answer any questions relating thereto\*. It is left to the discretion of the justices what degree of punishment shall be inflicted on the mother and reputed father of a bastard child, who are empowered to fix the rate of its support, and to charge the reputed father or mother as they shall see fit, with the payment of such money weekly, or otherwise; and if the party so charged neglects or refuses to comply therewith, they are to be committed to the common gaol until payment is made, or sufficient security given for their compliance; or to appear at the next quarter sessions of the peace, to be holden of the county where the parties reside†; — 7 Ja. c. 4. sect. 7. “Every lewd woman which shall  
 “ have any bastard child which may be chargeable to the  
 “ parish, the justices of the peace shall commit such woman  
 “ to the house of correction; there to be punished, and set  
 “ on work during the term of one whole year; and if she  
 “ shall afterwards (soon after) offend again, then to be com-  
 “ mitted to the said house of correction as aforesaid, and  
 “ there to remain until she put in sufficient securities for her  
 “ good behaviour not to offend so again.” But she may avoid the punishments assigned by this act, if she discharge the parish of keeping the bastard‡.—If the putative father,

\* 18 Eliz. c. 3. 6 G. II. c. 31.  
 art. 8th.

† Dalt. c. 11.

‡ Burn's J.



or the mother of a bastard child run away out of the parish, and leave the child upon the charge of the parish where it is born, the churchwardens and overseers of the poor of such parish are empowered, in case they leave behind them any goods or effects, to seize upon so much of their effects: or if lands, so much of the annual rents or profits thereof, as shall be ordained by any two justices, towards the discharge of the parish for the bringing up and providing for such bastard child <sup>a</sup>; and if such father returns, though fourteen years after, yet an order to fix the child on him is good, for there is no statute of limitation in these cases <sup>b</sup>.

A motion was made in the court of King's Bench, to quash an indictment against the defendant, for converting his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women, who after their delivery went away, and deserted their children, whereby such children became chargeable to the parish. Lord Mansfield took notice when it was first moved, of the narrow impolitic principles upon which the prosecutors had proceeded, and expressed his surprize how such a bill could be found. Mr. attorney general said, all that the prosecutors desire is, that the parish may be indemnified; for at present the parish is burdened with all their bastard children. But lord Mansfield. By what law is it criminal to deliver a woman when she is with child? To be sure this is not indictable <sup>c</sup>. But

By 13 Geo. III. c. 82. It is enacted, *That no hospital or place shall be established, used, or appropriated, or continue to be used or appropriated for the public reception of pregnant women, under public or private support, in any parish, &c. within that part of Great Britain called England, unless a license shall*

<sup>a</sup> 13 & 14 Cha. II. c. 1. s. 19.  
against Felix Macdonald, H. 5. Geo. III.

<sup>b</sup> 1 Sess. Ca. 77.  
3 Bur. Mansf. 1645.

<sup>c</sup> King

be first obtained from the justices of the peace in quarter sessions, which shall entitle the person to whom it is granted, to keep one house and no more for such purpose. §. 4. And over the door of every such house or hospital, shall be affixed an inscription in large letters, in the following words, viz. Licensed for the public reception of pregnant women, pursuant to an act of parliament passed in the 13th year of the reign of king George the Third. And the affixing and keeping such inscription shall be a condition in every license. §. 5. No bastard child or children born in such hospital or place, shall be legally settled or entitled to any relief from the parish wherein the hospital shall be situated, but shall follow the mother's settlement, and immediately gain a settlement where the mother was last legally settled. §. 6. If the parish where the mother is settled is within twenty miles of the hospital in which she is delivered, the charges of removing her and the bastard child shall be defrayed by such parish, which charges are to be regulated by any justice of the peace in the said parish, who has a power of levying the same on refusal of payment. §. 7. But an appeal lies to the quarter sessions within four months, and the determination there shall be final. §. 8. The parish officers of such parish where the mother and bastard child is settled, have power to apprehend the reputed father, and to punish the lewd mother in the same manner as if the child was born in their parish. §. 9. In cases where the mother's settlement cannot be ascertained, the law remains the same as before respecting the settlement of such bastard children. [That is to say, the parish where such child is born must take care of it.] §. 10. The manager or superintendant of such hospital is required to take all pregnant women, who apply for admission, before some justice of the peace, previous to her admission into his hospital, unless the woman's state of health will not permit it; and the justice of peace shall examine her upon oath, whether she is married or single. And if such pregnant woman shall not be able at the time of her admission to go  
before

before a justice in order to be examined, as soon as such woman shall be sufficiently recovered, she shall be taken and examined as was before directed. And the owner or keeper of such hospital shall enter the examination in a book to be kept for that purpose, and it shall be signed by the justice before whom it is taken. §. 11. If such woman produce an affidavit sworn by her before any justice of peace for the county, &c. wherein such hospital is situated, of her condition, whether it be married or single, she shall not be compellable to go before a justice of the peace, but such affidavit shall be filed at the hospital. §. 12. Four days at the least before such woman is discharged, the master of the hospital shall give notice in writing to the overseers or churchwardens of the parish, of such delivery, and such parish officers are required to attend at the hospital, and to convey the woman before some justice of the peace of the county, &c. where such birth shall happen, who shall examine the woman on oath relative to her last legal settlement, which shall be certified in writing. §. 13. If the woman is not in a condition to be taken out of the hospital, the overseers or churchwardens shall wait until she be sufficiently recovered. §. 15. No woman shall be kept a longer time than six weeks after delivery in such hospital. §. 16. Every wilful neglect of the directions laid down in this act, subjects the keeper, owner, or manager of such house or hospital, to the penalty of 50l. and overseers or churchwardens wilfully neglecting, forfeit 10l.

The mother of a bastard child may be examined upon oath concerning the reputed father; and of the time and other circumstances<sup>c</sup>. The mother of a bastard child marrying before an order is made for the maintenance of such child, is not thereby exempt from the charge of maintenance. In the case of Ellen Bent it was insisted, that being a feme-covert, she was not an object of the justices jurif-

<sup>c</sup> Dalt. Ub. sup.

diction; and the husband was not summoned. But lord Mansfield. This woman has disobeyed the order of the justices; and the statute prescribes the punishment here inflicted on her. There is no need to summon the husband in a criminal prosecution against the wife<sup>d</sup>. A charge of having a bastard child is cognizable by the court of general quarter sessions of the peace, which is held in every county once in every quarter of a year, namely, in the first week after Michaelmas-day; the first week after the Epiphany; the first week after the close of Easter; and in the week after the translation of St. Thomas a Becket, or the 7th of July.

*Murder of a bastard Child.*

**I**F a man who is the reputed father of a bastard child unborn, or any other person whatever advises the mother of it to murder it when born, and she does so, that person is considered as accessory to the murder before the fact. For though he may not be present or assisting when the crime is committed, yet by counselling or commanding another to commit the crime, he becomes subject to the punishment inflicted on the crime itself. For the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon as if he had given his advice after the birth. To constitute an accessory here, it is necessary, that the party be absent when the crime is committed, otherwise if he be present, he incurs the guilt of a principal. For though in some cases an accessory before the fact is considered in a less criminal light than the actual perpetrator of the crime, and is sometimes allowed the benefit of his clergy, yet in this instance the crime of each is considered as equally great<sup>e</sup>. If a woman is with child, and any gives her a

<sup>d</sup> 3 Burr. Mansf. 168.

<sup>e</sup> 2 Hawk. 315. 1 H. H. 433. Dyer. 186.

portion to destroy the child within her, and she takes it, and it works so strongly that it kills her; this is murder. For it was not given to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a portion to this end, must take the hazard, and if it kills the mother, it is murder. “ If any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, she shall suffer death as in case of murder, except she can prove by one witness at least, that the child was born dead<sup>f</sup>.” By which law the concealment of the death is considered as conclusive evidence of the child’s being murdered; and that by the mother; but this severe law is at this day more mildly interpreted; and some kind of presumptive evidence is required that the child was born alive, before the other constrained presumption is admitted, that the child was killed by its mother, because it is concealed by her. It hath been adjudged, where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a bastard child, and put it in a trunk, and did not discover it till the following night, yet that she was not within the statute, because she knocked for help. And if a woman confess herself with child beforehand, and afterwards be surprized and delivered, nobody being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of

<sup>f</sup> 21 Jas. I. c. 27.

hurt upon the body, or some other way, that the child was born alive &c.

*Of Rape committed on a Woman.*

**T**HE personal security of women has always been considered by every wise government as of the utmost importance; and in every state very severe laws have been made against such as violate their persons, or seduce their minds from the principles of virtue and honour. Among the Romans the crime of ravishment was punished with death and confiscation of goods; and even forcing a woman away from her friends without dishonouring her, was considered as a capital crime. And likewise, if a woman was stolen away from her parents or guardians, and debauched, the ravisher was deemed equally guilty, if the woman consented or was forced.—By the code of laws delivered by Moses to the Jews, the crime of rape was punished with death, if the woman was betrothed to another man; and if not betrothed, the man was sentenced to pay a fine of fifty shekels to the father of the damsel; and he was compelled to take her to wife. And when he was thus married to her, he was deprived of the power of obtaining a divorce, which that law allowed commonly in cases of marriage. The punishment inflicted for this crime in this country, has been different at different periods of time. By the Saxons it was made death; but William the Conqueror inflicted castration and loss of eyes, which continued to the reign of Henry the Third, cir. 1266, afterwards the offender was subject to a less grievous punishment; for provided the woman did not prosecute within forty days, it was considered only as a trespass, and was punished by two years imprison-

ment, and a fine at the discretion of the crown; and in case the offender was sued within the forty days, the words of the statute are; "The king shall do common right." But this law continued in force only ten years; the punishment being found not sufficient to deter from the offence. It was thereupon made felony <sup>a</sup>; and by a subsequent statute <sup>i</sup>, the benefit of clergy was taken away; by which latter statute the same punishment was inflicted for the abominable wickedness of carnally knowing, or abusing any woman child under the age of ten years; in which case the consent or non-consent is immaterial; as in such infantile state she is supposed to be incapable of distinguishing between right and wrong. Sir Matthew Hale is of opinion, that such abuse of an infant under twelve years of age, constitutes rape and felony <sup>k</sup>; that being what the common law terms the age of female discretion.—A man had been convicted of an assault upon an infant under ten, and upwards of five years of age, with intent to ravish her; afterwards eight of the jury who tried the cause, signed a paper in his favour, intimating their disapprobation of the verdict which they themselves had given. Lord Mansfield expressed great dislike of such representations made by jurymen after the time of delivering their verdict: it might be of very bad consequence to listen to such subsequent representations, contrary to what they had before found upon their oaths; and which representations might be obtained by improper application subsequently made to them; and it appeared that the child had also received the foul disease from him, judgment was therefore pronounced upon him. To be set upon the pillory at Charing-Cross for an hour, between the hours of twelve and two; to be imprisoned one year; to find

<sup>a</sup> 3 Edw. I. West. 1. c. 13.

<sup>i</sup> 13 Edw. I. West. 2. c. 34.

<sup>k</sup> 18 Eliz. c. 7.

sureties himself in 100l. and two sureties each in 50l. for his good behaviour for three years, and to pay a fine of 6s. 8d<sup>1</sup>.

A male infant, under the age of fourteen years, is presumed by law to be incapable of committing a rape, because though a propensity to profligate actions is, according to a law maxim, (*malitia supplet etatem*) a substitute for age, generally, yet in this case an absolute incapacity of body is imagined<sup>m</sup>. The law extends its protection even to women of bad fame in this respect; and if it be clearly proved to the satisfaction of a jury, that such an one has been forced, totally against her consent and inclination, the offender is guilty of felony without benefit of clergy. It would be indecent and improper here to relate circumstantially what is necessary to constitute a rape in the acceptation of the law: suffice it therefore to say, that it is when a man hath carnal knowledge of a woman by force, and against her will. And the attempt is not enough, the crime must amount to an entire and complete possession and enjoyment of the woman,

The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, upon the circumstances of fact that occur in that testimony. For instance; if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it. These and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stands unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was al-

<sup>1</sup> King against Edmund Theikell, T. 5. Geo. III, 3 Bur, Mans. 1696.  
<sup>m</sup> 1 H. P. C. 6, 30.



ledged to be committed was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false and feigned. Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligation of an oath; and even if she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion; first, because the nature of the offence being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses: and secondly, because the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand, from those who swear they heard her say so. And indeed it is now settled, that infants of any age are to be heard, and if they have any idea of an oath to be also sworn: it being found by experience that infants of very tender years often give the clearest and truest testimony. But in any of these cases, whether the child be sworn or not, it is to be wished, in order to render her evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet after being heard, may prove not to be credible,

dible, or such as the jury is bound to believe: for one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact. "It is true," observes Sir Matthew Hale, "that rape is a most detestable crime, and therefore ought severely and most impartially to be punished with death; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation, and concludes thus: "I mention these instances that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses."

In all indictments for rapes, the word *rapuit*, or ravished, is necessary, and must not be expressed by any periphrasis, or circuitry, in order to render the crime certain. In order to prevent malicious accusations, the ancient law required that the woman should immediately after go to the next town, and there make discovery to some credible persons of the injury done to her; and afterwards shall acquaint the high constable of the hundred, the coroner, and the sheriff, with the outrage; but by stat. West. 1. c. 13. abovementioned, the time of making the accusation was extended to forty days, but at present the law makes no such limitation; nor can it, for the crime is now punished at the suit of the king;

§ H. P. C. 634, 635. Blackst. 1. IV. c. 15.

and according to the well-known maxim of law, *nullum tempus occurrit regi*. But notwithstanding this restriction is now taken off, a jury are not disposed to convict the prisoner without the most satisfactory evidence. And the charge being brought long after the offence has been committed gives it a dubious face. Formerly the woman might after the offender was convicted, redeem him from the execution of the sentence by marrying him, provided the judge and her parents consented<sup>P</sup>. The offence of rape is no way mitigated by shewing that the woman at last yielded to the violence, if such consent was forced by fear of death or of duress<sup>P</sup>. Nor is it any excuse for the offender that she consented at any time after the fact. And it is enacted<sup>q</sup>, that when any woman is ravished, and afterwards consents to the ravisher, they shall both of them be disabled to have any inheritance, dower, or joint-tenement, but the next of blood shall enter; and the next of kin to the woman ravished may have an appeal against the ravisher, notwithstanding such consent; and the defendant shall not be received to wage battel. One woman may be a principal to the ravishment of another; for all who are present and actually assist a man to commit a rape, may be indicted as principal offenders, whether men or women. Accessaries both before and after the fact have their clergy<sup>r</sup>.—Two women were brought up by Habeas Corpus, who had been committed for being, assisting, aiding, and abetting to lord Baltimore, in feloniously ravishing Sarah Woodcock, spinster, against her will and consent. They were committed, as being charged upon the oath of the said Sarah Woodcock: but they were not charged either by the oath, or warrant of commitment, with being present; and therefore they were agreed to be only

<sup>o</sup> Bract. l. 3. c. 28.

<sup>P</sup> 1 Hawk. 108.

<sup>q</sup> 6 Rich. II. c. 6.

<sup>r</sup> 1 Hale's P. C. b. 33.

accessaries before the fact. The council for the prosecution declaring, that the prosecution was carried on merely for the sake of public justice, and that they had no other wish than to obtain that, declined either to consent to, or to oppose lord Baltimore's being bailed, but left it entirely to the discretion of the court to act as they should think proper, as their sole point in view was, that at all events his lordship should be amenable to justice. Lord Mansfield approved their conduct; at the same time he observed, that lord Baltimore's voluntary surrender was a strong indication that he had no intention of absconding from justice; the probability whereof was greatly heightened by the large property which he was known to possess, of which he would incur a forfeiture by running away. Therefore he was admitted to bail, on entering into recognizances, himself in 4000*l.* and four sureties in 1000*l.* each; and the two women in 400*l.* each, and their sureties in the like sum, to appear at the next assizes for the county of Surry. One of the women being a feme-covert was required to find four sureties in 200*l.* each\*. His lordship afterwards took his trial at the Surry assizes, and was found by the jury not guilty, but apparently contrary to the opinion of the judge who tried him (Baron Smythe.) The two women consequently were discharged. A principal in the second degree aiding and abetting the crime of rape, is deemed by the law as guilty as he in the first degree. By a very ancient statute it is enacted, that no pardon for rape shall be allowed, unless the offence be particularly specified therein. As it may be looked upon as a curious specimen of the style and manners of those ancient times (1389), I shall insert it as follows: "The king  
 " hearing the grievous complaint of our commons in parli-  
 " ament, of the outrageous, mischiefs, and damages which

\* King against lord Baltimore, Ann Darby, and Elizabeth Griffenburgh,  
 27 H. 1768. 4 Bur. Mansf. 2179.

“ have happened in his realm, for that treasons, murders,  
 “ and rapes of women, be commonly done and committed,  
 “ and the more because charters of pardon have been easily  
 “ granted in such cases, the commons requested our lord the  
 “ king, that such charters might not be granted; to whom  
 “ the king answered, that he will save his liberty and re-  
 “ gality as his progenitors have done heretofore; but to  
 “ nourish the more quietness and peace within his realm,  
 “ by the assent of the great men and nobles being in the same  
 “ parliament, he hath granted that no charter of pardon  
 “ from henceforth shall be allowed before any justice for  
 “ murder, or for the death of a man slain by await, assault,  
 “ or malice premeditated, treason or rape of a woman, unless  
 “ the crime be specified in the same charter.”

A woman is justified in killing a man who attempts to ravish her.”

*Appeal on a Rape.*

**A**Lthough offences committed against the peace and good government of society are indictable in the name of the king, he being the grand conservator thereof, and justice is administered to the party aggrieved in the king’s name; yet there are some offences which either the parties injured, or their relations, may prosecute by appeal. A rape is a crime for which the party may bring an appeal. If a woman under attainder of high treason be ravished, she being still under the protection of the law, even before pardon obtained, may prosecute her ravisher in the name of the king, and if he is found guilty on the indictment, and is pardoned by the king, after such pardon obtained she may maintain an

† 13 Rich. II. Stat. 2. c. 1.

“ 1 Hawk. 71.

appeal<sup>v</sup>. And a feme-covert without her husband may maintain an appeal of ravishment<sup>w</sup>.—The party accused may be tried by appeal either before or after the trial by indictment. If before any indictment, and he is acquitted thereon, no indictment can be preferred against him for the same offence. On the other hand, if he has been tried by indictment, and acquitted; or found guilty and pardoned by the king, he is still liable to be prosecuted at the suit of the party by appeal, not having been punished for the crime of which he stands accused. An appeal may be commenced before the sheriff and coroner, and removed from them into the King's Bench by *certiorari*<sup>x</sup>. But justices of the peace are not empowered to receive appeals. If a person appealed shall be acquitted, and the appeal shall appear to the court to have been malicious, the appellor shall be imprisoned for a year, and restore damages to the party, and be heavily fined by the king<sup>y</sup>. But if a verdict be given against the prisoner, his punishment is the same as if convicted by indictment; but herein the clemency of the king cannot interpose to stay the demands of justice; for it is considered as a private wrong done to an individual, and therefore a crime of such a nature as ought to exclude the intervention of the king's authority, as much as a verdict for damages obtained in an action of battery<sup>z</sup>.

<sup>v</sup> Foster's C. L. 62.

<sup>y</sup> 13 Edw. I. stat. 2. c. 12.

<sup>w</sup> 3 Inst. 131.

<sup>z</sup> 2 Hawk. 155.

<sup>x</sup> 2 Hawk. 156.

## C H A P. III.

*Of Adultery.*

**T**HE crime of adultery is punishable in the spiritual courts; but the common law courts allow the husband damages against the adulterer, considered as a civil injury: And a jury in a case of such atrocious guilt as that of violating the marriage bed, generally allots large damages. But the condition of the person sued is always considered, and the quantum of damages ascertained by his fortune and rank<sup>a</sup>. Besides which, many circumstances may concur to render the offence more or less flagitious; such as the relation or connection between the wife and the adulterer. The endeavours made use of to disarm her virtue, and the general colour of her conduct and behaviour; and particularly any obligation the husband may be under by marriage settlement subsisting, to provide for the children which his wife shall bear, notwithstanding the reasons which there are for believing them to be spurious<sup>b</sup>.—A motion was made for a new trial on an action for criminal conversation with the plaintiff's wife, on account of excessive damages. The jury (a special one) had given 500*l.* damages, the defendant was a clerk in the exchequer during pleasure, at a salary of 50*l.* a year only, which was his whole subsistence. The court were of opinion unanimously, that although there was no doubt of the power of the court to exercise a proper discretion, in setting aside verdicts for excessive damages, in cases where the quantum of the damages really suffered by

<sup>a</sup> Laws of Nisi Prius, 26.<sup>b</sup> Blackst. b. III. c. 8.

the plaintiff could be apparent, or were of such a nature that the court could properly judge of the degree of injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury ; yet the case was very different where it depended upon circumstances which were properly and solely under the cognizance of the jury, and were fit to be submitted to their decision and estimate : and they held the case of criminal conversation with another man's wife to be of this latter kind : for the injury suffered by the husband, and the damages to be assessed, must in their nature depend entirely upon circumstances, which it was strictly and properly the province of the jury to judge of, and the motion was denied<sup>c</sup>.—In an action in the court of King's Bench for criminal conversation with the plaintiff's wife, it was agreed by the jury that a verdict should be found for the plaintiff with 500*l.* damages, subject to the opinion of the court upon the following question, viz. Whether to support an action for a criminal conversation there must not be proof of an actual marriage ? The fact was, they were married at May-Fair chapel. The register-book could not be admitted in evidence ; Keith who married them was transported ; and the clerk who was present was dead ; so that the plaintiff could not prove the actual marriage by any evidence. It had been proved on the trial that articles had been made after the marriage between the husband and his wife, for the settlement of the wife's estate, with the privity of relations on both sides. Cohabitation, name, and reception of the woman as the wife, by every body was proved. And it was proved that the defendant Miller confessed to the landlord of the lodging, that she was captain Morris's wife, and that he had committed adultery with her. And it was insisted by Sir Fletcher Norton, that confession

<sup>c</sup> Wilson against Berkley, T. 31 Geo. II. 1 Burr. Manf. 609.



is the strongest evidence even of the highest crime. By lord Mansfield. I do not at present remember any action for criminal conversation where an actual marriage was not proved. Proof of actual marriage is always used and understood, in opposition to proof by cohabitation, reputation, and other circumstances, from which a marriage may be inferred. And the whole court were clearly of opinion, that in an action for criminal conversation with a man's wife, there must be evidence of a marriage in fact. Acknowledgment, cohabitation, and reputation, are not sufficient to maintain such action. And his lordship in delivering the opinion of the court, added, we do not at present define what may or may not be evidence of a marriage in fact. This is a sort of criminal action; there is no way of punishing this crime at common law; it ought not to depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the plaintiff himself. In prosecutions for bigamy, a marriage in fact must be proved. No inconvenience can happen by a determination founded on such principles, but inconveniences might arise from a contrary determination, which might render persons liable to actions founded upon evidence made by the persons themselves who shall bring the action. And the plaintiff was nonsuit <sup>d</sup>.

Where a man is taken in adultery with another man's wife; if the husband shall stab the adulterer so that he dies, he is guilty only of manslaughter <sup>e</sup>. But it is said, not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other <sup>f</sup>. License by the husband to the wife to lay with another man cannot be pleaded in barr to an action of trespass by the husband: nor that

<sup>d</sup> Morris, Esq; against Miller, Esq; E. 7. Geo. III. 4 Burr. Mansf. 2057.  
<sup>e</sup> Kcl. 137. See page                      <sup>f</sup> 1 Hawk. 71.

she was a notorious lewd woman: but such evidence may be given in mitigation of dangers<sup>s</sup>. A man brings a suit for separation by reason of adultery against his wife in the spiritual court. The wife may recriminate, and may give in an allegation pleading adultery in the husband. The prayer on each side will be for a separation: but if the party that is defendant in the original suit shall go on and prove the adultery, and the plaintiff shall not; the defendant will be entitled not only to a dismissal from the suit of the plaintiff originally brought, but to a separation upon account of the adultery pleaded by the defendant. If a man bring an action against B for lying with his wife, after which B assigns his estate to trustees, in trust to pay the several debts mentioned in a schedule, and such other debts as he shall mention within ten days; and A recovers 5000*l.* damages, and brings his bill to set aside this deed as fraudulent, and made to defeat him of his recovery: In this case A can have no other relief than to come in on the surplus, after the debts mentioned in the schedule; or appointed within ten days pursuant to it are satisfied. The deed being neither fraudulent in law nor equity. A being no creditor at the time of executing it; and it was conscientious in B to prefer his real creditors to one whose debt when recovered was founded on the debtors own misdeed<sup>h</sup>.

### *Of Bigamy or Polygamy.*

**T**HE crime of bigamy consists in a man having two wives living at the same time, or a woman having two husbands. Its signification in our law is exactly synonymous to polygamy; or having a plurality of husbands or wives at one time. All subsequent marriages during the life-time of the

<sup>s</sup> 12 Mod. 232.

<sup>h</sup> Prec. Chan.

first husband or wife, is simply void, and a mere nullity by the canon law. Anciently the temporal courts did not interfere to punish even the violation of matrimonial rights, and adultery, which in most countries of Europe is treated as a crime against the state, was not considered in England as an offence punishable by the magistrate, but left to the correction of ecclesiastical censure. At length, however, the violation of conjugal duty, accompanied by the circumstance of an open attack upon the order of society by a second marriage, was, by the statute 21 James I. c. 11. (A. D. 1604.) made a subject of criminal cognizance before the magistrate, and made felony under the mitigation of the benefit of clergy. Before the passing of which act, bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleaded, that the second espousals were null and void, because he had a former wife living, the special bigamy was not to be tried by the bishop's certificate<sup>1</sup>. "If any person within his majesty's dominions of England  
"and Wales, being married, shall marry any person, the  
"former husband or wife being alive; such offence shall  
"be felony<sup>2</sup>." But a man may claim the benefit of his clergy; or a woman may pray the benefit of the statute of William the Third). This act makes an exception to five cases, in which such second marriage, though in the first three it is void, is yet no felony: (1.) Where either party hath been continually abroad for seven years; whether the party in England hath notice of the other's being living or not. (2.) Where either party hath been absent from the other seven years, within this kingdom; and the remaining party hath had no notice of the other's being alive within that time. (3.) Where there is a divorce or separation *a mensa et thoro* by sentence in the ecclesiastical court. (4.) Where

<sup>1</sup> Staunford.

<sup>2</sup> 21 Ja. I. c. 11.

the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*, or (5.) Where either of the parties was under the age of consent at the time of the first marriage; for in such case the first marriage was voidable by the disagreement of either party; which this second marriage very clearly amounts to. But it is the opinion of Sir William Blackstone<sup>1</sup>, that if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them should marry again; such second marriage would be within the meaning and penalties of this act. If the first marriage be beyond sea, and the latter in England, the party may be indicted here, because the latter marriage makes the offence: but if the first marriage was in England, and the latter beyond sea, it seemeth that the offender cannot be indicted here; because the offence was not within the kingdom<sup>m</sup>. In an indictment of a man for bigamy, the first wife shall not be admitted as an evidence against her husband, because she is the true wife; but the second may, because she is indeed no wife at all, and so, *vice versa*, of a second husband<sup>n</sup>.—A libel was admitted in the spiritual court against a woman *causa jactitationis maritagi*, the woman prayed a prohibition to the ecclesiastical court, and the suggestion was, that this person who now libelled against her in a cause of jactitation, had been indicted at the Old Bailey for marrying her; he having a wife then living; that he was thereupon convicted, and had judgment to be burnt in the hand; that therefore the ecclesiastical court had no right to proceed. On which a prohibition was granted.—In the consistory court of Exeter, a cause of restitution of conjugal rights brought by the woman, the libel was admitted; an appeal was had to the court of Arches,

<sup>1</sup> Comm. b. IV. c. 13.<sup>m</sup> Keyl. 79, 84.<sup>n</sup> 1 H. P. C. 693.

the judge pronounced for the appeal, and was proceeding upon the merits of the cause, but upon the 4th of November, 1727, he was served with a prohibition, the ground for obtaining which was, that Sarah Fursman pretending to be the lawful wife of the said Fursman, had indicted him for bigamy, in marrying another wife, and failed in proof of her own marriage. Whereupon Fursman was acquitted, and therefore it was said, the ecclesiastical court should not proceed °.

We shall here present our readers with the substance of the trial of Elizabeth, duchess dowager of Kingston, before the house of peers, on an indictment for bigamy; but to give a clearer idea of the nature of that process, and of the court of judicature before which she was tried, it may be necessary to give a short account of the office of the lord high steward, and of the privileges of trial of peers indicted for treason or felony, or for misprison of either.

The office of the lord high steward is very ancient; it was annexed to the barony of Hinckly, which passed into the family of Leicester, and then into that of Lancaster; and in the person of Henry the Fourth was united to the crown; but ever since that time, as the powers and privileges which the law delegated to that officer, were looked upon as too extensive, and therefore dangerous, such officer has only been occasionally created, for the purpose of a coronation, or the trial of a peer; either of which when completed, the lord high steward breaks his staff, and the office is vacant P. And it hath been granted for many centuries past, *pro hac vice* only; and it hath been the constant prac-

° Fursman against Fursman.  
Lectures, 72, 73.

P 1 Madox's Exhc. 51. Sullivan's

tice (and therefore seems now to have become necessary) to grant it to a lord of parliament; else he is incapable of trying such delinquent peer<sup>9</sup>, and the lord chancellor is generally invested with the office. When such an indictment is therefore found by a grand jury of freeholders in the King's Bench; or at the assizes, before the justices of Oyer and Terminer, it is to be removed by a writ of *certiorari* into the court of the lord high steward; which only has power to determine it. A peer may plead a pardon before the court of King's Bench; and the judges have power to allow it; in order to prevent the trouble of appointing a lord high steward, merely for the purpose of receiving such plea. But the peer may not plead in that inferior court on any other plea; as, guilty, or not guilty of the indictment; but only in this court; because in consequence of such plea, it is possible that judgment of death might be awarded against him. The king therefore, in case a peer be indicted of treason, felony, or misprision, creates a lord high steward *pro hac vice*, by commission under the great seal, which recites the indictment so found; and gives his grace the high steward power to receive and try it, *secundum legem & consuetudinem anglie*. Then when the indictment is regularly removed by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty selected from the body of the peers: then the number came to be indefinite; and the custom was, for the lord high steward to summon as many as he thought proper, but of late years not less than twenty-three<sup>r</sup>; and that those lords only should sit upon the trial; which threw an unconstitutional weight of power into the

<sup>9</sup> Prynne on 4 Inst. 46. Yearb. 13 H. VIII. c. 11.

<sup>r</sup> Keyl. 56.

hands of the crown, and this its great officer, by empowering them to select such peers only as were disposed to further the views of the prince. Accordingly, when the earl of Clarendon fell into disgrace with Charles II. a design was formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court<sup>s</sup>. But now, by stat. 7 W. III. c. 3. all peers who have a right to sit and vote in parliament, shall be summoned upon all trials, at least twenty days before such trial, to appear and vote therein. And every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery. During the session of parliament, the trial of an indicted peer is not properly in the court of the lord high steward, but before the court of our lord the king in parliament<sup>t</sup>. It is true a lord high steward is always appointed in that case, to regulate and add weight to the proceedings; but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact; and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord steward, which is held in the recess of parliament, he is the sole judge of matters of law; as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court; so he has no right to intermix with them, in giving any vote upon the trial<sup>u</sup>.—It has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprision. Some incline to ima-

<sup>s</sup> Carte's Life of Ormond, vol. II. Trials, 214.

<sup>t</sup> Foet. 141.

<sup>u</sup> 4 State

gine them included under the general words of the statute of king William, "All peers, who have a right to sit and vote in parliament," but the expression had been much clearer, if it had been, "all lords," and not "all peers." For though bishops, on account of the baronies annexed to their bishopricks are clearly lords of parliament; yet their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility; and perhaps this word might be inserted with a view purposely to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament; much less in the court we are now treating of: for indeed, they usually, voluntarily withdraw, but enter a protest, declaring their right to stay. But by the 11th chapter of the constitutions of Clarendon, 11 Hen. II. they are expressly excluded from sitting and voting in trials of life or limb. And the determination of the house of lords in the earl of Denby's case (15 May 1679.) which hath ever since been adhered to, is consonant to these constitutions; that the lords spiritual have a right to stay and sit in court in capital cases, till the court proceeds to the vote of guilty, or not guilty." It must be noted, that this resolution extends only to trials in full parliament: for to the court of the lord high steward, in which no vote can be given, but merely that of guilty or not guilty, no bishop as such, ever was or could be summoned. And though the statute of king William regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new model or alter its constitution, and consequently does not give the lords spiritual any right in cases of blood which they had not before<sup>v</sup>. And what makes their exclusion more reasonable is, that they have no right to be

<sup>v</sup> Feft. 248.



tried themselves in the court of the lord high steward<sup>w</sup>; and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house; as appears from the trials of Popish lords; of lords under age; and since the union, of the Scotch nobility, though not in the number of the sixteen who sit and vote in the house of peers; and also from the trials of females; such as the queen consort, or dowager; and of all peeresses by birth; and peeresses by marriage also; unless they have when dowagers disparaged themselves by taking a commoner to their second husband<sup>x</sup>.

*Substance of the Trial of the Duchess Dowager of Kingston, for Bigamy, before the House of Lords.*

**A**PRIL 1776, Elizabeth duchess dowager of Kingston was brought to her trial before the house of lords, on an indictment found against her at Hicks's-Hall, by the grand jury of Middlesex, (founded on the statute 21st Ja. I. c. 11.) for bigamy, in having married Evelyn Pierpoint, duke of Kingston, living her first husband the honourable Augustus John Hervey. The sentence of the consistory court of London in a suit of jactitation instituted by her grace against Augustus John Hervey, was pleaded in barr to her trial, but after very long and able pleadings by council on both sides, the judges were unanimously of opinion that such sentence was no barr to a prosecution set on foot by a third person, in no respect whatever a party to the former suit, and more especially could not stop proceedings on an indictment for a criminal offence to which the king was the plaintiff, and who was absolutely precluded from being a party in the suit of jactitation.—Her grace was therefore put

<sup>w</sup> Brought, Abr. tit. Trial, 142.

<sup>x</sup> Blackst. b. IV. c. 19.

upon her trial by her peers ; when the following facts came out in evidence.

In the summer of 1744, Mr. Hervey contracted an acquaintance with Miss Chudleigh, at Winchester races ; he was then a lieutenant on board the Cornwall, lying at Portsmouth, and destined for the West-Indies<sup>y</sup>. An intimacy immediately began. Miss Chudleigh was then on a visit with her aunt, a Mrs. Hanmer, at the house of a Mr. Merrill, her cousin, whose mother was Mrs. Hanmer's sister ; that gentleman resided at Lainston, in the vicinity of Winchester. In the August following Mr. Hervey made a second visit for a few days at Lainston, during which short stay the marriage was contracted, celebrated, and consummated. Very strong motives on both sides urged them to have the marriage celebrated with as much privacy as possible ; the fortune of both was insufficient to maintain them in such a situation as his birth, and her situation and views gave pretensions to, the income of her place would have failed, and the displeasure of his noble family rendered it impossible on his part to avow the connection. The marriage was therefore to be kept secret, and for that purpose was celebrated with the utmost privacy. Lainston is a small parish<sup>z</sup>, the church to which stood at the end of Mr. Merrill's garden. On the 4th of August, 1744, Mr. Amis, the then rector, was appointed to be at the church alone late at night, at eleven o'clock. Mr. Hervey and Miss Chudleigh went out as if to walk in the garden, followed by

<sup>y</sup> Miss Chudleigh was then about eighteen years of age. In the preceeding year she had been introduced into the family of the late princess dowager of Wales as her maid of honour. Mr. Hervey was the second son of the then earl of Bristol, and then twenty years of age. *Collins's Peerage*, vol. 4. pa. 357, *Attorney General*, for the prosecution.

<sup>z</sup> The living being about 15l. per ann. and Mr. Merrill's the only house in the parish, *Attorney General*.

Mrs. Hanmer and her maid-servant, Mr. Merrill, and a Mr. Mounteney, an intimate friend of Mr. Merrill's, whose evidence might be thought necessary to corroborate that of the aunt and cousin in establishing the fact in case it should ever be disputed, and likewise to remove any imputation which might otherwise have been cast on the other witnesses as relations of the lady. The ceremony was there performed by Mr. Amis<sup>a</sup>, Mr. Mounteney holding a taper in the crown of his hat, Mrs. Hanmer's maid (who afterwards married a servant of Mr. Hervey's, and is now called Ann Cradock) was then dispatched to see that the coast was clear, and they returned into the house without being observed by any of the servants. The marriage was consummated that same night; and Mr. Hervey slept with his bride the two or three nights he remained at Lainston, after which he repaired to his ship at Portsmouth, which had received sailing orders, and was destined for the West-Indies. Miss Chudleigh went back to her situation as maid of honour to the princess dowager of Wales. In 1746 Mr. Hervey, being returned to England in October, cohabited with her as his wife for about the space of a month, his stay in England being no longer: he then went to the Mediterranean, from whence he returned in January 1747. The fruit of their intercourse was a son born at Chelsea some time in the year 1747<sup>b</sup>. Miss Chudleigh's usual place of residence was in Conduit-street, where Mr. Hervey cohabited with her as her husband, under the restraints which their plan of keeping the marriage secret demanded, until the May following,

<sup>a</sup> For which he subjected himself to a penalty of 100l. by stat. 7 & 8 Will. c. 35. which inflicts that penalty on a clergyman for marrying without a licence, or banns published. The laws respecting marriage are now put upon a footing totally different by the Marriage Act.

<sup>b</sup> Which it should seem soon after died,

when some differences arose between them, which proceeded to such extremities as to cause all intercourse to be broken off. Twelve years elapsed, and this state of enmity continued until, in 1759, Mrs. Hervey, who still passed for Miss Chudleigh, paid a visit to Mr. Amis, the clergyman, at Winchester, who was then in a very declining state of health; her cousin Merrill accompanied her to his house; she there expressed her desire to Mr. Amis, who then kept his bed, to have a certificate of her marriage with Mr. Hervey: for this purpose Mr. Merrill brought a sheet of stamp paper to write it upon, but being at a loss about the form, they sent for one Spearing, an attorney in the city, and Miss Chudleigh, being unwilling to be seen by him, concealed herself in a closet in the room. Spearing objected to the method which they had proposed, and advised that a book should be bought, and the marriage registered therein, in the usual form, and in the presence of the lady, who thereupon appeared. The attorney's advice was taken, the book was bought, and the marriage registered and signed by the clergyman. The book was entitled, *Marriages, Births, and Burials, in the Parish of Lainston*. The first entry ran, *the 22d of August, 1742, buried Mrs. Susannah Merrill, relict of John Merrill, Esq.* The next was, *the 4th of August, 1744; married the honourable Augustus John Hervey, Esq; to Miss Elizabeth Chudleigh, daughter of colonel Thomas Chudleigh, late of Chelsea college, deceased, in the parish church of Lainston, by me Thomas Amis*. Mrs. Hervey thanked Mr. Amis, and told him it might be an hundred thousand pounds in her way<sup>c</sup>, and being in a most communicative humour, she told

<sup>c</sup> The infirm state of the then Earl of Bristol's health, seemed to open a prospect of a rich succession and an earldom. It was thought worth while, as nothing better had then offered, to be countess of Bristol, and for that purpose to adjust the proofs of her marriage; but the earl of Bristol recovered his health, and this register was then forgotten till a very different occasion arose for enquiring

told Mrs. Amis of the child she had had by Mr. Hervey, a fine boy, but it was dead, and how she had borrowed 100l. of her aunt Hanmer to make baby cloaths; she then sealed up the register, and left it with Mrs. Amis, in charge to deliver it to Mr. Merrill<sup>d</sup> on the death of her husband, which she accordingly did, he living only a few weeks.

In 1768<sup>e</sup> Mr. Hervey sent an abrupt and peremptory message to his lady by Ann Cradock, informing her that he was determined to obtain a divorce from her. He likewise solicited Mr. Cæsar Hawkins to signify the same resolution, but in terms more polite and respectful, saying he wished him (Mr. Hawkins) to carry a message to Miss Chudleigh, upon a subject that was very disagreeable, but that he thought it would be less shocking to be carried by, and received from a person she knew, than from any stranger; that he had been for some time past very unhappy on account of his matrimonial connections with Miss Chudleigh; that he wished to have his freedom, on account of the criminality of her conduct, and from the proofs he had of it, which he had been for some time past collecting and getting together, with intent and purpose to procure a divorce; that he believed they contained the most ample and abundant proofs, circumstances, and every thing relative to such proof; that he intended to pursue his prosecution with the strictest firmness and resolution, but that he retained such a regard and respect for her, and as a gentleman to his own character,

quiring after it. Mr. Hervey's elder brother was then earl of Bristol, having succeeded to the title on the death of his father in 1754. *Collins's Peerage*, vol. IV. pa. 348. *Attorney General*.

<sup>d</sup> Who it may be presumed had the presentation to the living of Lainston.

<sup>e</sup> Nine years had now passed since the lady's former hopes of a great title and fortune had fallen to the ground; she had at length formed a plan to obtain the same object another way. Mr. Hervey also turned his thoughts to a more agreeable connection. *Attorney General*.

that he wished not to mix malice or ill-temper in the course of it ; but that in every respect he would wish to appear and act on the line of a man of honour, and of a gentleman ; that he wished she should understand that his soliciting Mr. Hawkins to carry the message should be received by her as a mark of that disposition, that as most probably in the number of so many testimonial depositions as were there collected, there might be many offensive circumstances named, superfluous to the necessary legal proofs ; that if she pleased, her lawyers, either with or without herself, might, in conjunction with his lawyers, look over all the depositions, and that if any parts were found tending to indecent or scandalous reflections, which his gentlemen of the law should think might be omitted without weakening his cause, he himself should have no objection to it ; that as he intended only to act upon the principles of a gentleman and a man of honour, he should hope she would not produce any unnecessary or vexatious delays to the suit, or enhance the expences of it, as he did not intend to prosecute to gain by any demands of damages,”

Both these messages were delivered to the lady, to the first of which she replied, “ am I to make myself a whore to oblige him ?” In answer to the other she desired Mr. Hawkins to report to Mr. Hervey, that “ she was obliged to him for the polite parts of his message, but as to the subject of the divorce she should cut that short, by wishing him to understand that she did not acknowledge him for her legal husband, and should put him to the defiance of such proof.” In consequence of these menaces, on the 18th of August she entered a caveat at Doctor’s Commons, to hinder any process passing under the seal of the court at the suit of Mr. Hervey against her in any matrimonial cause, without notice given

to her proctor. Mr. Hervey, however, changed his mind, and took no steps in the business of a divorce.

In Michaelmas session 1768, Miss Chudleigh instituted a suit of jactitation of marriage in the common form; the answer given in by Mr. Hervey was, a cross libel claiming the rights of marriage; his libel was large in alledging all the indifferent circumstances which attended the courtship, contract, marriage ceremony, consummation, and cohabitation; but when it came to the facts themselves, it stated a secret courtship, and a contract with the privity of Mrs. Hanmer alone, who was then dead: the marriage ceremony, which in truth was celebrated in the church of Lainston, was said to have been performed at Mr. Merrill's house, in the parish of Sparshot, by Mr. Amis, in the presence of Mrs. Hanmer, Mr. Merrill, and Mr. Mounteney, who were all three dead; Ann Cradock, the only surviving witness of the marriage, was dropped; and to shut her out more perfectly, although she actually saw them in bed together, the consummation was said to have passed without the privity or knowlege of any part of the family and servants of Mr. Merrill.

On the outset of this business a great difficulty presented itself to the lady, she was obliged to put in a personal answer upon oath to Mr. Hervey's answer, but by a most ingenious piece of casuistry her scruples of conscience were removed; she denied the previous contract, she evaded the proposal of marriage, by stating that it was made to Mrs. Hanmer without her privity, not denying that it was afterwards communicated to her; the rest of the article, which contains a circumstantial allegation of the marriage, together with the time, place, witnesses, and so forth, she buries in the formulary conclusion of every answer, by denying the rest  
of

of the said pretended position or article to be true in any part thereof. Finally, she demurs to the article which alledges consummation, which denial of the article to be true in *any part* reserves this salvo, viz. the whole averment of marriage was but one part of the article, the language is so constructed that that averment makes but one member of a sentence, and yet it combines false circumstances with true. *They were in Mr. Merrill's house at Sparshot joined together in holy matrimony*, this part of the article as her answer calls it is not true; it is true they were married, but not true that they were married at Sparshot, or at Mr. Merrill's house<sup>f</sup>.

<sup>f</sup> The plan of the evidence also was framed upon the same measured line. The articles had excluded every part of the family; even the woman whom Mr. Hervey had sent to demand the divorce was omitted: but her husband is produced to swear, that in the year 1744, Mr. Hervey danced with Miss Chudleigh at Winchester races, and visited her at Lainston, and in 1746, he heard a rumour of their marriage. Mary Edwards and Ann Hildham, servants in Mr. Merrill's family, did not contradict the article they were examined to, which alledged, that none of his servants knew any thing of the matter, but they had heard the report. So had Messrs. Robinson, Hoffach, and Edwards. Such was the amount of Mr. Hervey's evidence; in which the witnesses make a great shew of zeal to disclose all they knew, with a proper degree of caution to explain that they knew nothing.

The form of examining witnesses was likewise observed on her part, and she proved most irrefragably, that she passed as a single woman: went by her maiden name; was maid of honour to the princess dowager; bought and sold; borrowed money of Mr. Drummond, and kept cash with him, and other bankers, by the name of Elizabeth Chudleigh; nay, that Mr. Merrill and Mrs. Hanmer, who had agreed to keep the marriage secret, conversed and corresponded with her by that name.

For this purpose a great variety of witnesses was called; which it would have been very rash to have produced without some foregone agreement, or perfect understanding that they should not be cross-examined. Many of them could not have kept their secret under that discussion; even in the imperfect and wretched manner in which cross examination is managed upon paper, and in those courts. Therefore not a single interrogatory was filed; nor a single witness cross examined, though produced to articles exceedingly confidential, such as might naturally have excited the curiosity of an adverse party to have made further enquiries. *Attorney General,*

Soon



Soon after the taking this affidavit, the lady expressed herself to the following purpose to Mr. Hawkins; she said that she had had a great deal of concern and agitation of mind from finding that a positive oath was expected from her; that she was not married, and which she had for some time together expected would have been put to her in that form; that she thought she should have dropped her suit entirely, for that she would not for the whole world have taken that kind of direct positive oath, but that what had been offered to her had been so complicated with other things that were certainly not true, that she could take, and had taken the oath, with a very safe conscience.

Thus was the object of the jactitation suit obtained, and in a few months after she was married to the duke of Kingston.

The evidence given on this trial was, the libel of Chudleigh against Hervey in the Consistory court; Hervey against Hervey, called Chudleigh, in answer; and Chudley against Hervey in reply. Sentence of the said court read and promulged 10th of February, 1769. The caveat entered by Miss Chudleigh at Doctor's Commons, 18th of August, 1768. The register of her marriage with Mr. Hervey, and the register of her marriage with the duke of Kingston. The witnesses examined were,

#### For the PROSECUTION.

Ann Cradock; to prove the marriage ceremony performed, the consummation afterwards, and from the information of the lady, that a child had been born.

§ The widow of Mr. Amis, who afterwards married a Mr. Phillips, going to wait on the duchess soon after her second marriage, "Was it not very good-natured," says her grace to her, "in the duke to marry an old maid?" I looked her in the face (says the witness) and smiled, but said nothing.

Mr.

Mr. Cæsar Hawkins; to prove the marriage by the declaration made to him by both the parties, and the birth of a child.

The honourable Sophia Charlotte Fettiplace; to prove the duchess acknowledging her marriage with Mr. Hervey.

Lord Barrington; to prove the same.

Judith Phillips; to prove the entry in the register, of the first marriage by her former husband; and the birth of a child from the information of the prisoner.

Rev. S. Kenchin; to prove the hand writing of Mr. Amis.

Rev. John Dennis; to prove the same.

#### For the P R I S O N E R.

Ann Pritchard; to invalidate the evidence of Ann Cradock, by deposing, that Ann Cradock told her she was promised a sinecure from the prosecutor for giving her evidence.

Dr. Warren; to prove that Dr. Collyer, one of the advocates employed in the jactitation suit, was incapable of attending the court on account of the ill state of his health.

Mr. Laroche: to prove that Dr. Collyer had, in his presence and hearing, assured the duke of Kingston, that he might safely marry Miss Chudleigh, for that in so doing, he neither offended against the laws of God or man.

All the lords found the prisoner guilty of the felony whereof she stood indicted, one lord only excepted, who said that she was guilty *erroneously*, but not *intentionally*. But on her praying the benefit of her peerage to be exempt from the punishment which is inflicted for clergyable offences, namely, being burnt in the brawn of the left thumb with the letter T. after arguments of council, and the opinion of the judges taken, the lords agreed to allow her prayer to have the benefit of the statutes, and she was discharged, paying her fees.

*Of the Punishments inflicted by the Spiritual Courts.**Of Penance.*

**I**N the case of incest or incontinence, the delinquent is usually enjoined to do a public penance, either in the cathedral, parish church, or market place; bare-legged and bare-headed; in a white sheet; and to make confession of his or her crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and at the discretion of the judge. And likewise for smaller faults or scandals, a public satisfaction or penance, as the judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners. Respect being had to the quality of the offence, and circumstances of the fact, as in the case of defamation<sup>b</sup>. The statute of *Circumspecte agatis*, and of *Articuli Clerici*, determine the penance enjoined in the court Christian to be corporal: but the offender may commute such penance for money; and no prohibition from any of the king's courts will lay against such proceedings in the court Christian. But it was thought adviseable in succeeding times, that commutation for penance should be only admitted for very weighty reasons; and in very particular cases; and therein by the express direction of the bishops: and in the reign of queen Anne, the matter of commutation for penance was taken into consideration by the convocation; but their determinations turned chiefly on the manner in which the money received for commutations should be applied.

<sup>b</sup> God. Append. 18.  
stat. 2. c. 2.

<sup>i</sup> 13 Edw. I. stat. 4. 9 Edw. II.

*Of Excommunication.*

**A** Sentence of the ecclesiastical courts, if not conformed to by the parties against whom it is pronounced, is enforced by excommunication; which is twofold, the less and the greater excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments. The greater proceeds further; and excludes him not only from these, but also from the company of all Christians. But if the judge of any spiritual court excommunicates a man for a cause of which he hath not a legal cognizance, the party may have an action against him at common law; and he is likewise liable to be indicted at the suit of the king <sup>1</sup>.

Heavy as the penalty of excommunication is, considered in a serious light; there are, notwithstanding, many obstinate and profligate men who would despise the *brutum fulmen* of mere ecclesiastical censures; especially when pronounced by a petty surrogate in the country, for railing, or contumelious words; for nonpayment of fees or costs; or for other trivial causes. The common law therefore kindly steps in to their aid, and lends a supporting hand to an otherwise tottering authority; for an excommunicated person is disabled from doing any act that is required to be done by one that is *probus et legalis homo*. He cannot serve upon juries; cannot be a witness in any court; and, which is the worst of all, cannot bring an action either real or personal, to recover lands or money due to him <sup>m</sup>. Nor is this the whole; for if within forty days after the sentence has been published in the church, the offender does not submit and

<sup>1</sup> 2 Inst. 623.<sup>m</sup> Litt. sect. 201.

abide by the sentence of the spiritual court; the bishop may certify such contempt to the king in chancery<sup>n</sup>; upon which there issues out a writ to the sheriff of the county; called from the bishop's certificate, a *significavit*; or from its effect, a writ *de excommunicato capiendo*: and the sheriff shall thereupon take the offender, and imprison him in the county goal, till he is reconciled to the church; and such reconciliation certified to the bishop, upon which another writ, *de excommunicato deliberando* issues out of the chancery, to deliver and release him<sup>o</sup>.—Nor has the statute law been unmindful of the spiritual courts; for by two statutes<sup>p</sup> it is provided, in case of disobedience to any definitive sentence before an ecclesiastical judge, any two justices of the peace may commit the party to prison without bail or mainprize, till he enters into a recognizance, with sufficient sureties, to give due obedience to the process and sentence of the court.—In a cause of jactitation of marriage, the defendant was excommunicated, and taken upon a *Capias*, and brought up by a *Habeas Corpus*; and exception was taken to the writ, that therein no addition was given to the defendant. But the court held, that for any of the causes mentioned in the statute 5 Eliz. c. 23. the defendant's addition ought to be in the writ, but that in other cases no addition is necessary<sup>q</sup>.

Where a man is excommunicated by the law of the holy church, and he sues an action real or personal; the defendant may plead, that he who sueth is excommunicated; the proof of which rests on the bishop's letter under his seal. If the plaintiff cannot deny the plea, the writ shall not abate; but the judgment shall be, that the defendant shall go quit without day; and the plaintiff on procuring his

<sup>n</sup> Swinb. 367.

<sup>o</sup> F. N. B. 62.

<sup>p</sup> 27 Hen. VIII. c. 20.

32 Hen. VIII. c. 7.

<sup>q</sup> 1 Salk. 294.

letters of absolution, and producing them in proof before the court, he shall have a re-summons, or re-attachment upon his original, according to the nature of his writ<sup>r</sup>. The greater excommunication renders a person incapable of making a testament, but under the lesser he may<sup>s</sup>. An excommunicate person is not rendered thereby incapable absolutely of being an executor, or of receiving a legacy; but he cannot be admitted by the ordinary until his absolution is obtained; and consequently he can perform no part of the duty of an executor until exonerated<sup>t</sup>.

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#### C H A P. IV.

*Of the Punishments of Women for various Crimes and Offences, and of the Wife's Right of Appeal against the Murderer of her Husband.*

**I**N the ages of ignorance and superstition, when the Romish clergy lorded it over mankind under the disguise of religion; these insatiable tyrants not only grasped at the possession of all the landed property in the kingdom, but likewise endeavoured to exempt every member of their body from the cognizance of the temporal courts of judicature, though guilty of the most atrocious crimes. But though they possessed great influence over the crown, and were supported in every lawless attempt by the usurpations of the bishops of Rome, yet they never could obtain a total exemption from secular jurisdiction. The method of proceeding with cleri-

<sup>r</sup> Litt. Sect. 207.

<sup>s</sup> Swinb. 109.

<sup>t</sup> God. O. L. 37.

cal delinquents, as settled in the reign of Henry VI. was, to arraign them before the temporal court; and the prisoner must either then plead the benefit of his clergy, by way of declinatory plea; or after conviction, by way of arresting judgment. This latter way was most usually practised, as it was more to the satisfaction of the court to have the crime previously ascertained by confession, or the verdict of a jury; and also as it was more advantageous to the prisoner himself, who, if acquitted, needed not to make use of the plea of his clergy: if upon such trial a clerk was convicted, no punishment could be inflicted on him, but he must be delivered over to the ordinary to be dealt with according to the ecclesiastical canons, which adjudged him to a new trial before the bishop of the diocese, or his deputy; which court, after the parade of mock justice, usually acquitted him. In the early periods of our constitution, none but such as had *habitu et tonsurum clericalem* were indulged in this plea; but afterwards a much greater latitude was given to persons claiming it: for every one who could read was admitted to it. Such a qualification being considered in those barbarous days as a proof of great learning; such therefore were styled lay-clerks. But as knowledge grew to be more generally diffused, it was found that more laymen than divines were admitted to the *privilegium clericale*: it was therefore thought proper to make a distinction between learned laymen, and real clerks in orders; and the statute devises<sup>u</sup>, that no person once admitted to the benefit of clergy, shall be allowed to claim it a second time, unless he produces his orders: and effectually to distinguish the persons of clerks and laymen, all of the latter who were allowed this privilege of clergy, were directed to be burnt with a hot iron in the brawn of the left thumb for all offences then clergyable,

<sup>u</sup> 4Hen. VII. c. 13.

which continues to be the law at this day. By the conviction, a person having had his clergy, forfeits all his goods that he had at the time of the conviction, notwithstanding his burning in the hand. Yet by burning in the hand he is put into a capacity of purchasing and retaining other goods. And presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. And it seems that it restores the party to his credit, and consequently enables him to be a good witness. And it is holden, that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are purged away<sup>v</sup>. A subsequent statute further enacts<sup>w</sup>, that lords of parliament, and peers of the realm, may have the benefit of clergy, equivalent to that of the clergy, for the first offence, although they cannot read, and without being burnt in the hand, for all offences then clergyable to commoners. It is now in the power of the judge to re-commit lay-offenders convicted of clergyable offences to prison, for any time not exceeding a year; but this benefit of clergy does not extend to women; for by an express act of parliament it is directed, that women convicted of simple larcenies under the value of 10s. shall be burnt in the hand, whipped, stocked, or imprisoned, for any time not exceeding a year, (for they were not called upon to read); and by a subsequent statute<sup>x</sup>, a woman being convicted of an offence for which a man may have his clergy, shall suffer the same punishment that a man shall suffer that has the benefit of his clergy allowed; that is, shall be burnt in the hand, and further kept in prison as the court shall see fit, not exceeding one year; but the benefit of this statute can be pleaded only once<sup>y</sup>. Such was the

<sup>v</sup> 2 H. H. 388, 389. 2 Hawk, 364.

<sup>w</sup> 1 Edw. VI. c. 12.

<sup>x</sup> 3 & 4 W. & M. c. 9.

<sup>y</sup> 4 & 5 W. & M. c. 24. s. 13.



law until the beginning of the present century; when the wisdom of the legislature perceiving the unsuitness of allowing an indulgence to the learned and well educated who commit offences, which was denied to the illiterate, enacted, (A. D. 1706) <sup>a</sup> that the benefit of clergy shall be granted to all such whose crimes admit of it, without making the ability to read the condition of obtaining it. But it being soon found that the law holding forth such extended lenity, did not sufficiently deter evil disposed persons from committing the lower degrees of felony; to curb such spirit more effectually, without having recourse to the rigour of capital punishments, it was enacted <sup>b</sup>, that when any person shall be convicted of any larceny, either great or petit, and shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand, or whipping; the court in their discretion, instead of such burning in the hand, or whipping, may direct such offenders to be transported to America for seven years; and if they return within that time, it shall be felony without benefit of clergy. A very masterly expounder of the law remarks, that the conjunction *and* here used, seems to render the sentence of transportation not properly to extend to women, or to persons convicted of petit larceny, which was not a clergyable offence <sup>c</sup>. Upon the whole then it appears, that women cannot claim the benefit of their clergy, but the benefit of the statute, which is equivalent to it. Before the passing of which law, women were entitled to no mitigation of the punishment for felonious offences. And now a woman who hath once been admitted to plead the benefit of the statute, as well as a man, not being within holy orders, who hath once been admitted to his clergy, shall not be allowed the same plea a

<sup>a</sup> 5 Ann, c. 6.  
<sup>b</sup> IV. c. 28.

<sup>a</sup> 4 Geo. I. c. 11. 6 Geo. I. c. 23.

<sup>c</sup> Blackst.

second time, upon being found guilty of a second felonious offence. It is now decided that a person guilty of a felony to which the benefit of the statute extends, shall be discharged without burning in the hand<sup>c</sup>.

*Punishment of a Woman guilty of Treason.*

THE judgment against a woman for high treason is not the same as against a man traitor, viz. to be hanged, cut down alive, have the bowels taken out, and the body quartered; but she is to be drawn to the place of execution, and there burnt. For the public exhibition of their bodies, and dismembering them, in the same manner as is practised to the men, would be a violation of that natural decency and delicacy inherent, and at all times to be cherished in the sex. And the humanity of the English nation has authorized by a tacit consent, an almost general mitigation of such part of their judgments, as favours of torture and cruelty; a sledge or hurdle being allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental and by negligence) of any person being embowelled or burnt, till previously deprived of sensation by strangling.

If a wife kills her husband she is guilty of petit treason, and is to be punished accordingly<sup>d</sup>; and even if she be divorced *a mensa et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband she is a traitress<sup>e</sup>. The idea of the punishment for women guilty of petit treason, says Sir William Blackstone<sup>f</sup>, seems to have been handed down to us from the laws of the ancient Druids,

<sup>c</sup> Trial of the duchess of Kingston.

<sup>d</sup> 2 Hawk. 444. 2 H. P. C. 399.

<sup>e</sup> 1 H. P. C. 381.

<sup>f</sup> Com. b. IV. c. 14.

which

which condemned a woman to be burnt for murdered her husband. And his opinion is founded on the following passage in *Cæsar de Bell, Gal. lib. vi. §. 19. Viri in Uxores sicuti in liberos, vitæ necisque habent potestatem; et quum pater familiæ illustriore loco natus decesset, ejus propinqui conveniunt; et de morte, si res in suspicionem venit, de uxoribus in servilem modum quæstionem habent; et si compertum est, igni atq. omnibus tormentis excruiatas interficiunt.* If the husband maliciously kills his wife, it is but murder<sup>s</sup>. If a woman, being a lunatic, kills her husband, or any other, it is no treason or felony in her who was deprived of her understanding by the act of God<sup>h</sup>.

*A Woman capitally convicted, pleading Pregnancy.*

**A** Woman capitally convicted, and pleading pregnancy, will procure the respite of the execution of the sentence passed upon her; if it be found that the plea is a good one: to determine which, the judge must direct a jury of twelve matrons, or discreet women, to enquire into the fact; and if they bring in their verdict *quick with child*, for barely *with child*, unless it be alive in the womb, is not sufficient; execution is stayed till she be either delivered, or proves by the course of nature, not to have been with child at all. But if she once has had the benefit of this reprieve; and has been delivered; if after that she becomes again pregnant, she is not allowed to make the same plea as before; for she may be executed before the child is quick in the womb, and her incontinence ought not to cause the sentence of the law to be evaded<sup>i</sup>.

<sup>s</sup> Dalt. c. 58.

<sup>h</sup> Park. 364. 5.

<sup>i</sup> 1 H. P. C. 369.

*When a Woman is not punishable for a felonious Act.*

**I**F a man commit any crime which is considered as felony without the benefit of clergy, a wife is not deemed an accessory by the receipt or concealment of her husband. For a feme-covert is always considered by the law as acting under the authority and direction of her husband, and therefore it is considered as her duty to conceal and secrete him. But though the law speaks this language in behalf of the wife, yet in every other instance it is so strict, where a felony is actually committed, that the nearest relations of the person so offending, who receive or aid him, are deemed accessories after the fact. For if the husband assists his wife who has committed a felony, he becomes an accessory *ex post facto*: so also if the parent assists the child, or the child his parent; one brother another; a master his servant; or a servant his master, they are considered in the like degree of guilt<sup>k</sup>. But if the wife alone, the husband being ignorant of it, receives any other person being a felon, the wife becomes an accessory, and not the husband: but if the husband and wife both receive a felon knowingly, it is adjudged the act of the husband only, and the wife is acquitted. A feme-covert shall not be punished for committing any theft in company with her husband; the law supposing that she did it by the coercion of her husband; but the bare command of her husband shall be no excuse for committing a theft if he was not present; much less is she excused if she commit a theft of her own voluntary act. And for such atrocious crimes as treason, murder, or robbery, she is liable to suffer, although the fact was committed in company with her husband, or by his coercion<sup>l</sup>. And such coercion is always presumed until the contrary appears in evidence<sup>m</sup>.

<sup>k</sup> 2 Hawk. 320.

<sup>l</sup> 1 Hawk. 2.

<sup>m</sup> 1 H. H. 47.

An accessory before the fact committed, is he that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. Accessories after the fact are, where a person knowing the felony to have been committed by another, relieves, comforts, or assists the felon. A man may be an accessory to an accessory, by receiving him, knowing him to be an accessory to a felon<sup>n</sup>.

*Appeal by a Wife on the Murder of her Husband.*

A Wife may appeal against the murderer of her husband, or in the case of manslaughter; and she alone can do it, to the exclusion of all other relations, except the heir male on the death of his ancestor; but this right to appeal is vested only in the four nearest degrees of blood. And in case the wife marries again pending the appeal, it becomes void; or if she marries in the interval between judgment and execution, the execution is stayed. If the person killed leaves a wife free from the imputation of his murder, she only and not the heir shall have the appeal. If there be no wife, and the heir is accused of the murder, the person who next to him would have been heir male shall bring the appeal, if he be within the limited degrees of consanguinity. If the wife kills her husband, the heir may appeal her of the death; and by the statute of Gloucester<sup>o</sup>, all appeals of murder must be sued within a year and a day after the death of the party<sup>p</sup>. But if the murderer has been found guilty of manslaughter on an indictment, and has had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. If a man against whom judgment has been given in a case of high treason or felony, be slain

<sup>p</sup> 2 Hawk. 315. 1 H. H. 622. 2 Hawk. 320.

<sup>o</sup> 6 Edw. I. c. 9.

<sup>p</sup> Fost. C. L. 63.

without authority of law, his wife shall have an appeal. For though his heir is barred by the attainder, if it be high treason, which corrupts the blood, and dissolves all relations grounded on consanguinity, yet the relation grounded on the matrimonial contract continues till death<sup>9</sup>. In all appeals of murder, the appellant must set forth the offence with the utmost certainty; declaring the fact; in what part of the body; the year, day, the town or place where the deed was done; and with what weapon. And it must likewise be described by such words of art, as the law has appropriated to that purpose<sup>r</sup>.

*Of the Crime of killing a Child in its Mother's Womb.*

**A**S soon as an infant is able to stir in its mother's womb, it becomes an object of protection in the eye of the law; therefore if a woman is quick with child, and by a potion or otherwise she killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law accounted homicide or manslaughter; but latter authorities have thought it to be a great misprison only. But if the child be born alive, and afterwards die of the potion or bruises it received in the womb, it is murder in such as administered or gave them<sup>s</sup>.

<sup>9</sup> 3 Inst. 215.

<sup>r</sup> H. P. C. 433.

<sup>r</sup> 2 Hawk. 177.

<sup>s</sup> 1 Hawk. 80. 3 Inst. 50.

T H E  
L A W S  
R E S P E C T I N G  
W O M E N.

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B O O K T H E F O U R T H.

*Of the Laws concerning Parents and Children ; and  
the Interests of Infants.*

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C H A P. I.

*Of Parent and Child.*

*Of the Rights of Parents.*

**T**H E Romans entertained such exalted notions of the rights of parents, that their laws invested a father with the absolute power of life and death over his child : and the same law seems to have prevailed among the aborigines of this island <sup>a</sup>. But gradually this

<sup>a</sup> Cæsar de Bell, Gal. b. VI. sect. 19. See the quotation in page 345.

unlimited power among the Romans became restrained ; and the father was no longer considered as justifiable in killing his child, even if he had committed some atrocious crime. But a father's authority over his children, though restrained, was to the last, so long as that empire subsisted, extremely great ; insomuch that whatever property a son might acquire by industry, or by fortuitous events, it vested in the father for his life, so as to entitle him to the entire profits of such income, he being only required to leave it unimpaired to his son at his death <sup>b</sup>.—By the laws of England, a father only acquires a rightful authority over his children ; for they give no power to the mother, only consider her as entitled to a dutiful and reverential regard.

Parents are considered as bound in duty to maintain their children, both by the law of nature, and their own proper act, in bringing them into the world ; by which they enter into a voluntary obligation to endeavour, as far as in them lies, that the life which they have imparted shall be supported and preserved. By which incontrovertible reasoning, children have a right to receive maintenance from their parents ; and a celebrated politician has observed, that “ the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children ; for that ascertains and makes known the person who is bound to fulfil this obligation ; whereas in promiscuous and illicit commerce between the sexes, the father is unknown, and the mother finds a thousand obstacles in her way. Shame, remorse, the constraint of her sex, and the rigour of the laws, that stifle her inclinations to perform it ; and besides, she generally wants ability <sup>c</sup>.” It is upon this principle that our laws oblige the father and mother, grandfather and

<sup>b</sup> Tit. 28. s. 12. Gibb. 8. 47. 10. Inst. 2. 9. 1.  
<sup>c</sup> Lev. 23. c. 2.

<sup>d</sup> L'esp. des L.

grand-



grandmother, of poor impotent persons, to maintain such their issue, if of sufficient ability for that purpose, in such a manner as shall be fixed and rated at the quarter sessions of the peace. And if a parent runs away and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them towards their relief<sup>d</sup>. And it is now settled to be law, that if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it; the law considering the natural obligation which was upon the woman in the light of a debt when single, and therefore subjects her husband to discharge it, as in the case of all other debts. But the obligation on the husband ceases on the death of his wife, the relation being then dissolved. Upon a motion to quash an order of justices, upon the father to maintain his wife's daughter by a former husband, his wife being dead; the court decreed that the husband ought to provide for the daughter-in-law during the wife's life, in the right of his wife; but when the wife dies the relationship is dissolved, and he is not by any means obliged to provide for the daughter-in-law after her mother's death<sup>e</sup>. But a father is not bound to maintain his son's wife, as was determined in the case of the king against Dempson, M. 7. Geo. II. It was moved to quash an order upon the father to pay a certain sum weekly to his son's wife; his son having run away from her as soon as he married her; and she having had a child in the mean time. To this order two exceptions were taken. 1st. That it appears the son's wife was an adulteress, and that a sentence of divorce *a mensa et thoro* had been pronounced for adultery, and therefore the husband himself would not have been bound to maintain her, much more the

<sup>d</sup> 43 Eliz. c. 2.<sup>e</sup> T. 9. Ann Q. against Clenham. Fpley, 39, 42.

husband's father could not. To this it was answered, and allowed by the court; that whatever effect this act of the wife might have upon the husband, it could not have any upon the parish. 2d. It was objected that the statute extends only to natural relations, and the court was of opinion that this objection was conclusive<sup>f</sup>. Nor does it appear that the son-in-law is bound to maintain his wife's mother. Pratt chief justice. By the law of nature a man was bound to take care of his own father and mother, but there being no temporal obligations to enforce this law, it was found necessary to establish it by act of parliament; and that can be extended no further than the law of nature went before; and the law of nature doth not reach to relations in law<sup>g</sup>. If the father be living, but is not of ability to maintain his child, the grandfather being of ability, may be compelled to keep the grandchild<sup>h</sup>. But whether by this act of Elizabeth the obligation of maintenance is laid on grandchildren towards their grandfathers and grandmothers, hath not been determined by any case before a court. Holt chief justice asserted, that the word children in the statute, should be understood to extend to grandchildren<sup>i</sup>. But this obligation on the parents to maintain their children extends no further after they become of age, or twenty-one years, than to such as are impotent, or incapable of procuring a subsistence for themselves by their industry. Nor does the law exact a liberal allowance: for the forfeiture on withholding this support is only 20s. a month; but then it must be remembered that the statute by which this forfeiture is incurred, has been enacted so long since as the year 1601, so that the intention of the legislature at the time of enacting this law is now almost defeated by the great difference in the value of

<sup>f</sup> Str. 955.<sup>g</sup> Case of the king against Munden, T. 5. Geo. I. Str. 190.<sup>h</sup> Case of Queen against Joyce, M. 6 Ann, Vin. tit. Poor, c. 3.  
of S. 210.<sup>i</sup> Case

money now, and at the time of laying on the fine, by the rapid flow of wealth from the eastern and western quarters of the globe into Europe. But the obligations laid on natural relations to maintain each other, is considered to extend further than the penalty incurred by the statute, in case of ability in the party; as appears by the case of the king against Robinson, T. 32 & 33 G. II. The defendant was indicted for refusing to obey an order of sessions, for maintaining his two infant grandchildren. It was moved in arrest of judgment, and urged, that this is a new offence; and where a statute creates a new offence, and gives a particular penalty, and a specific method of recovering the same, that course ought to be pursued, and the party shall not be punished by indictment. By lord Mansfield chief justice. The rule is certain, that where a statute creates a new offence by prohibiting and making unlawful, what was lawful before, and appoints a specific remedy against such new offence, by a particular sanction, and particular method of proceeding, that method must be pursued, and no other. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute. Because there the sanction is cumulative, and doth not exclude the common law punishment. In the present case a remedy existed before the statute of 43 Elizabeth, for disobedience to an order of justices is an offence indictable at common law. So that here are two remedies; one to proceed by way of indictment for disobeying the order, where the weekly payment is neglected, or refused to be made; the other to distrain for the 20s. penalty, after neglect of payment for a month. The former method has been taken in the present case: and there is no doubt But an indictment will lie for disobeying

an order of sessions. And the court were unanimously of opinion, that the judgment ought not to be arrested<sup>k</sup>. It has been further found expedient to rescue children from an unnatural antipathy which their parents might conceive against them, in consequence of religious bigotry. Therefore it is enacted, that if any Popish parent shall refuse to allow his Protestant child a fitting maintenance, with a view to compel him or her to change their religion, the lord chancellor may, by an order of court, oblige him to make a reasonable and proper provision<sup>l</sup>. After the passing of which act a circumstance happened which was not then foreseen. The only daughter of a wealthy Jew embraced christianity, for which her father turned her out of doors, and refused to afford her any assistance; she applied to the lord chancellor for relief, but the court was of opinion that she could claim none, which occasioned another act of parliament to be passed, by which Jewish parents were subjected to the authority of the lord chancellor, exactly in the same manner as those of the Romish persuasion by the former act, when their children embraced protestantism<sup>m</sup>. The father is considered as in duty bound to give his children an education suitable to his rank and station in life; but no compulsory law exists against such cruel and unnatural fathers as are totally indifferent about the future welfare of their offspring, and suffer them to be exposed to the fatal consequences which follow from an early habit of ignorance and idleness. Indeed many wholesome laws have been made with a design to prevent the children of the poor from being infected with these baneful qualities. The numerous charity schools in every part of England have a very salutary tendency to render the infant poor tractable and orderly; and perhaps such regulations are the only means which can be properly taken

<sup>k</sup> 1 Burr. Manf. 799.

<sup>l</sup> 11 & 12 W. c. 4.

<sup>m</sup> 1 Ann, St. 1. c. 30.

to guard against the neglect and indifference of poor parents to their children, and prevent the injuries which the state sustains from a profligate and sordid body of poor. And further, the overseers of parishes are empowered by the statutes for apprenticing poor children, to place them out at the public expence, in such a manner as shall render them of advantage to the community, according to their abilities and station. “It is not easy to imagine or allow,” says baron Puffendorf, “that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they think it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences which his family so uninstructed will be sure to bring upon him.” The attention of our laws seem to be principally directed to prevent the principles of Popery being instilled into young minds: for by two acts of parliament it is enacted<sup>o</sup>, that if any person sends any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into, or reside in any Popish college, or to be instructed, persuaded, or strengthened in the Popish religion, in such case the child itself is subjected to certain disabilities, being thereby disabled from taking any gift, conveyance, descent, devise, or otherwise, of any lands or goods until they conform. The parent, or person sending, shall forfeit 100*l.* which shall go to the sole

<sup>n</sup> Puffend. L. of N & N. b. 6. c. 2. sect. 12.

<sup>o</sup> 1 Ja. I. c. 4.

3 Ja. I. c. 5.

use and benefit of him that shall discover the offence ; and by a subsequent statute<sup>p</sup>, if any parent or other shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in any priory, abbey, nunnery, Popish university, college, or school, or house of Jesuits, or priests, or any private Popish family, in order to be instructed, persuaded, or confirmed in the Popish religion ; or shall contribute any thing towards their maintenance when abroad, by any pretext whatever ; the person both sending and sent, shall be disabled from suing in law and equity ; or to be executor, or administrator to any person ; or to enjoy any legacy or deed of gift, or to bear any office in the realm ; and shall forfeit all his goods and chattels ; and likewise all his real estate for life. But these penal statutes seem not to have effectually prevented the practice which they prohibit.

Although there are no positive laws to compel a father to give his children a proper education, yet the law invests a father with a power sufficient to keep his children in subjection and obedience. He may lawfully correct his child whilst under age ; and his consent is now become absolutely necessary to the marriage of a child during minority ; and that being withheld renders a marriage void. But our law gives a parent no right in the property of his son, any further than by making him the guardian or trustee of his child during his minority. But when the minor comes of age, the father is bound to render an account of the produce. Further, he may claim the benefit of his children's labour whilst he supports them, and they live with him. At the age of twenty-one years the power of the father ceases ; but until then it is not dissolved even by his death, for he may by will appoint a guardian to his children, either born or

unborn<sup>a</sup>. He may also delegate a part of his authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and as such has a portion of the power of the parent vested in him, viz. of restraint and correction, as may be necessary to answer the purposes for which he is employed.

A parent may lawfully maintain and uphold his children in their law-suits, without being subject to a prosecution on the charge of maintaining quarrels, which the law imputes to all such persons as uphold another in a suit or prosecution<sup>r</sup>.

A parent is justified in an assault and battery in defence of the person of his child: nay to such lengths does the law allow the natural affection of a parent to his children to carry him, that where a man's son was beaten by another boy, and the father went near a mile to find the aggressor, and there revenged the son's quarrel by beating the other boy, of which beating he afterwards died, it was not held murder, but manslaughter merely<sup>s</sup>. In like manner a child is justified in defending the person of his parent, or in maintaining his suit in a court of law; and no misconduct and worthlessness in the parent is admitted to dissolve that natural right which a parent has to protection and relief from his child, whenever he becomes so unhappy as to stand in need of it. — A father may be a competent witness for or against his son; or the son for or against the father; the relationship may be an exception to the credit or credibility of the witness, but is no exception against the competency. But such relationship is a good cause of challenge against a juror<sup>t</sup>.

<sup>a</sup> 12 Car. II. c. 24.

<sup>r</sup> 2 Inst. 564.

<sup>s</sup> Hawk. 131.

<sup>t</sup> Cro. Ja. 296.

<sup>1</sup> Hawk. 83.

<sup>2</sup> Hale's, h. 276.

A parent has a right to dispose of his property by will as he pleases. It being looked upon as a natural right of a free man to dispose of his effects as well as of himself *ad libitum*, without any other restraint than the safety and welfare of the state in which he lives render necessary. By the ancient custom of London indeed, which was formerly universal throughout the whole kingdom, the children of freemen were entitled to one-third of their father's effects, to be equally divided among them, of which he could not deprive them; but this custom was annulled by act of parliament in 1724<sup>u</sup>; and among persons of rank and fortune a competency is generally provided for younger children, and the bulk of the estate settled on the eldest by marriage articles. The courts of justice likewise always extend the utmost possible liberality of decision in favour of children, and will not suffer them to be disinherited by any expressions that are dubious or ambiguous, but the testator's intentions must be clearly and unquestionably apparent<sup>v</sup>.

### *Of Baptism.*

Concerning baptism of infants by laymen, or by women in particular cases, the following ordinances are in force.—Women, when their time of child-bearing is near at hand, shall have water ready for baptizing the child, in cases of necessity, the form of which baptism shall be: *I crysten thee in the name of the Fader, and of the Sone, and of the Holy Goste*. And infants thus baptized when in imminent danger, shall not be re-baptized; but the priest shall supply afterwards the rest of the ceremony of baptism<sup>x</sup>. And in such cases of extremity, where the child is baptized at home, the water used in baptism shall be either poured into the fire, or carried to the church to be put into the font; and

<sup>u</sup> 11 Geo. I. c. 11. See page 223.

<sup>v</sup> 1 Lev. 130.

<sup>x</sup> Lind. 63. 344. 41.



the vessel shall be burnt, or applied to the uses of the church <sup>w</sup>. And the rubrick of the Common Prayer gives the following directions concerning baptism. “ And also they shall warn  
 “ them, that without great cause they procure not their  
 “ children to be baptized at home in their houses. And  
 “ when great need shall compel them so to do, then baptism  
 “ shall be administered on this fashion : first let the lawful  
 “ minister, and them that be present, call upon God for his  
 “ grace, and say the Lord’s prayer, if the time will suffer :  
 “ and then the child being named by some one that is pre-  
 “ sent, the said minister shall dip it in the water, or pour  
 “ water upon it.” But bishop Fleetwood says, the church does not hold lay-baptism to be invalid : and he directs that baptism shall, from indispensable necessity, be had if possible. And he directs it as the sentiment of the church on that point, that lay-baptism be administered when a lawful minister cannot be had, rather than none at all <sup>x</sup>.

### *Of Popish Baptism.*

**E**VERY Popish recusant shall within one month next after the birth of any child, cause it to be baptized by a lawful minister in open church ; or if it is infirm, to be baptized by a lawful minister in his own house, on pain of 100l. one third to the king, one third to him who should sue, and one third to the poor <sup>y</sup>.

### *Of Abduction of a Child from its Father.*

**I**T is a matter of doubt, whether the taking away a child from its father is considered by the common law as a civil injury. Indeed before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir. The loss or value of the heir’s marriage was made the only ground or cause of action. But this point was not universally assented

<sup>w</sup> Lind. 241.

<sup>x</sup> Fleetwood’s Works, 539.

<sup>y</sup> 3 Ja. I. c. 5. sect. 14.

to : others holding, that an action would lie for the taking away any of the children, as the parent had an interest in them all, to provide for their education<sup>a</sup>. The learned commentator on the laws of England is of opinion, that before the abolition of feodal tenures, it was an injury to the father to take away any one of his children equally with the heir ; and therefore supposes that it still remains an injury at common law, and is remediable by a writ of ravishment, or action of trespass *vie et armis de filio (vel filia) raptō vel abducto*<sup>b</sup>. In the same manner as the husband may have it on account of the abduction of his wife<sup>b</sup>. And the act 4 & 5 Phil. & Mary, c. 8. subjects any one above the age of fourteen years to two years imprisonment, or a fine at the discretion of the court, who shall take away any maid, or woman child, under the age of sixteen years, from the custody and against the will of her father, or such as have a right of guardianship over her<sup>c</sup>.

May 26, 1758, an Habeas Corpus directed to James Clarke, Esq; having been issued by lord Mansfield, commanding him to have before his lordship the body of Lydia Henrietta Clarke, his daughter, then detained in his custody, together with the day and cause of her taking and detainer. The said Lydia Henrietta Clarke was this day produced in court. Mr. Clarke, the young lady's father returned, " that she was his daughter, and that on the 22d of March last, without any leave from, or notice to him or his wife, (her mother) she secretly went away from his house in Great Ormond Street, and took with her a box or bundle containing several sorts of wearing apparel, and about 27l. in money. That being credibly informed that his daughter had been enveighed away from him by the instigation of one James Mervin, a person of no visible occupation or substance,

<sup>a</sup> Cro. Eliz. 770.<sup>a</sup> F. N. B. 90.<sup>b</sup> Blackst. b. III. c. 8.

See page 53.

<sup>c</sup> See page 296.

nor keeping any house, with design to marry her to one Joseph Isgrave, who is under age, and who about two years ago served the said James Clarke as a foot-boy, and is yet in no better condition; and that they were all gone together into the Isle of Thanet, where they were to get a licence for such marriage. He being under great concern for the welfare of his said daughter; and in order to prevent the marriage, (she being entitled to a considerable fortune after her mother's death, and being his only child) took a journey to find them out, and (if in his power) to prevent the intended marriage; and gave directions to his nephew, Mr. Peter Starkie Floyer, to go in quest of them; and if he found them, to endeavour to prevent the marriage, and to bring his daughter to him. That his nephew found them at a place called Broad Stairs in the Isle of Thanet, where James Mervin passed for the uncle of Miss Lydia Henrietta Clarke; that she came home with his nephew to her father's house in Great Ormond Street, where she arrived the 7th of April last, and James Mervin came with her as far as Canterbury, but Joseph Isgrave ran away, and as James Mervin pretends is gone to Holland. That on her being thus brought home to him, he did, in the tenderest manner, represent to her the ruin she was inevitably falling into, if she pursued a design of marrying a person so much inferior to herself, and who having no visible way of livelihood, must reduce her to the utmost necessity and want, as well as disgrace and shame. Whereupon she assured her father, that she was not married. He through his duty as a parent, and from the affection which he bore her, received her into his house, and the mildest and best endeavours have been used to dissuade her from such marriage, such endeavours extending no further than what he humbly conceives to be consistent with that parental care which may be used by a parent towards his child; and no severity whatever has been used to her.

her. That she has ever since her return, of her own accord continued to live and reside with her father; and still doth reside with him at his house of her own accord, and under no restraint whatever."—The Habeas Corpus was issued upon an affidavit made by James Mervin abovementioned, who made out a very plausible case, fully sufficient, if true, to obtain the writ, but which was now alledged by Mr. Norton (of counsel with Mr. Clarke) to be absolutely and utterly false in fact. In it the young lady was sworn to be of full age, (viz. about twenty-two years) which was true; but it is also alledged, that she had been hardly used, and confined by her father, and other circumstances which were false. Lord Mansfield asked her, whether she desired to continue with her father or to go elsewhere? She answered, to continue with her father, who had always used her with great tenderness, and much better than she deserved. Upon which the court told her, she was at liberty to go.—Then Mr. Norton moved, that Mervin's affidavit might be filed, together with the return of the writ, as Mr. Clarke was determined to prosecute him for perjury. The court ordered it to be so, and recommended the prosecution very strongly.<sup>c</sup>—22d of June, 1763, a writ of Habeas Corpus was directed to Sir Francis Blake Delaval, commanding him to produce the body of Ann Catley, in the court of King's Bench. And a charge was likewise brought against him, together with William Bates and John Faine, for joining in an unlawful combination and conspiracy to remove this girl, an infant, about eighteen years of age, out of the hands of the defendant Bates, a musician, to whom she was bound apprentice by her father, (a gentleman's coachman) without the knowledge or consent of the said Catley her father, and to place her in the hands of Sir Francis,

<sup>c</sup> King against James Clarke, Esq; T. 31 Geo. II. r Burrow's, Mansf. 606.

for the purpose of prostitution.—The court did not think proper to deliver the girl to her father, she having sworn to have received ill usage from him before she was put out apprentice; but discharged her from all restraint, and left her at liberty to go where she would; and declared, that whoever should molest her on her departure, did it at their peril. There having been cause shewn why an information should not be exhibited against the defendants for certain misdemeanors, lord Mansfield spoke as follows: This is a motion for an information against the defendants, for a conspiracy to put this young girl, an apprentice to one of them, into the hands of a gentleman of rank and fortune, for the purpose of prostitution, contrary to decency and morality, and without the approbation or knowledge of her father, who prosecutes them for it, and has now cleared himself of all imputation, and appears to be an innocent and an injured man. The fact uncontroverted is this: A female infant, then about fifteen years, was bound apprentice by her father to the defendant Bates, a music-master; the girl appeared to have natural talents for music; the father became bound to the master in the penalty of 200*l.* for his daughter's performance of the covenants contained in the indenture: she became eminent for vocal music, and thereby gained a great profit to Bates her master. During her apprenticeship she is debauched by Sir Francis Delaval, whilst she resides in the house of Bates's father, as Bates himself was a single man and no housekeeper. In April last Bates her master indirectly assigns her to Sir Francis, as much as it was in his power to assign her over; and this is done plainly and manifestly for bad purposes. Bates at the same time releases the penalty to the father, but without his application, or even privity; and receives the 200*l.* from Sir Francis by the hands of his taylor, who is employed to pay it Bates. Sir Francis also enters into a bond to Bates to secure to him the profits

profits arising from the girl's singing this summer at Marybone; and then she is indentured to Sir Francis Delaval to learn music of him: and she covenants with him, both in the usual covenants of indenture of apprenticeship, and likewise in several others, as, not to quit even his apartments, &c. These articles between the parties are signed by all but the father; and a bond is drawn from him, in the penalty of 200*l.* for his daughter's performance of these covenants, which he never executed: and the girl goes and lives, and still does live with Sir Francis, notoriously as a kept mistress. Thus she has been played over by Bates into his hands for this purpose. No man can avoid seeing all this, let him wink ever so much. I remember a cause in the court of Chancery, wherein it appeared that a man had formally assigned his wife over to another man; and lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case. It is true that many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical court, and are appropriated to it; but if you except those appropriated cases, this court is the *custos morum* of the people, and has superintendency of offences *contra bonos mores*; and upon this ground both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here. However, there is besides this in the present case, a conspiracy and confederacy among the defendants, which are clearly and indisputably within the proper jurisdiction of this court: and in the conspiracy there are three concerned. Bates, the master, clearly knew of the connection between Sir Francis and his apprentice in February: but he gave no notice at all about it to her father till a considerable time after he knew it himself, and at last neither tells nor hints to him any thing further, than that she had been seen riding in the park, attended

attended by a servant of Sir Francis Delaval, and that she neglected her business and his instructions, and recommended her mother taking a lodging for her, and lodging with her. In April he enters into this transaction with Sir Francis, who is to pay him the penalty of the original indentures, and then to have the girl. Yet of all this he gives no notice to the father. Bates' own affidavit is highly improbable; and though the girl in her's swears, to exculpate Bates as well as Sir Francis Delaval, yet it is plainly discoverable from what she swears, that Bates' account is not a true one. Bates therefore ought clearly to be included in the rule for an information. Then as to Faine the attorney. Though I never heard any imputation on him before, yet in this instance he has certainly acted inconsistently with the duty of his profession, and that chastity of character which it is incumbent upon an attorney always to support. He has drawn and prepared all these instruments; and the indentures, whereby this girl, already bound to Bates, binds herself apprentice to Sir Francis Delaval, to be taught music by him, and all the covenants contained in it; and was privy to the compensation that Bates received from Sir Francis, so that it was impossible for him to be ignorant of the real intention of this transaction. He could not imagine that she really bound herself to Sir Francis to be taught music by him, but must undoubtedly have been conscious of the true purpose for which these deeds and writings were calculated. He therefore ought to be included in the absolute rule for an information. Then as to Sir Francis himself there can remain no doubt. Therefore let the rule be absolute for all three.<sup>d</sup> — The plaintiff's daughter being about twenty-three years of age, hired herself to one Saul as a servant, and went to live with him, and served him some time. During her ser-

<sup>d</sup> King against Sir Francis Blake Delaval and others, T. 3 Geo. III, 3 Bur. Mans. 1434.

vice she was gotten with child by the defendant Parkes, and becoming big with child, and unable thereby to perform her service as she was used and ought to do, she was discharged by her master Saul, who paid her her wages in proportion to the time she had served him; and the plaintiff her father received her when no one else would, and lodged and boarded her in his house; she was there delivered of a male bastard child, and the plaintiff her father maintained her at his own expence in her lying-in. The question which arose at the trial, and which was reserved for the opinion of the court of King's Bench was, whether the plaintiff could maintain this action? Mr. Davenport for the plaintiff endeavoured to shew that he could. First, the action is maintainable by the father upon the footing of being her master; he alledged in the declaration *per quod servitium amisit*. He agreed that no action would lie but by reason of the loss of her service. No action lies for assaulting and getting a daughter with child, but if he that does it enters the father's house, and assaults the daughter, and gets her with child, the father may maintain an action for entering his house, and assaulting his daughter, and getting her with child. Saul the master here sustains no damage, for he discharges her as soon as she became unserviceable to him, and paid her wages only in proportion to her past services. The father is obliged to maintain his child thus discharged helpless, and unable to maintain herself<sup>c</sup>; therefore from the consequential damage, an action is maintainable by her father, in whose house she resided, and where she must in this case be considered as a servant; and her being twenty-three years of age makes no difference. This young woman's master could not bring an action against this defendant; nobody but the father could sue; and the damage is the same to him, whether she is over or under

<sup>c</sup> 43 Eliz. c. 2.



twenty-one. Mr. Wallace for the defendant insisted, that the father's interest in the child, whatever it might be during infancy, ceases at the child's coming to the age of twenty-one years. Many injuries may be done to a child which are not the subjects of actions by the father. Indeed an action will lie by a father for taking away his son or his daughter<sup>f</sup>, and the father has an interest in his heir<sup>g</sup>. But an action will not lie for debauching his daughter<sup>h</sup>. If the father maintains the daughter in his own house, he is entitled to her service, and may maintain an action for the loss of her service; but here she was hired out to service in another man's house. It is not stated here that the woman was unable to maintain herself, or that the father was unable to maintain her. It appearing that the parties were poor, the court proposed a compromise, which was accepted. By which it was agreed, that all proceedings should be stayed without costs on either side. Lord Mansfield addressing himself to Mr. Wallace said: It is not upon any doubt in point of law that I propose this compromise. [Meaning the reporter supposes, that he was clear with Mr. Wallace, that this action could not be maintained, and therefore in compassion to the plaintiff, whose daughter had been injured by the defendant, the court wished to save him from the payment of costs<sup>i</sup>.]

### *Cloathing of a Child.*

**I**F any one takes away another's child and cloaths it, afterwards the father retakes it back, the garments shall cease to be the property of him who provided them, being now annexed to the person of the child<sup>k</sup>.

<sup>f</sup> F. N. B. 260.

<sup>g</sup> Plow. 267.

<sup>h</sup> 2 L. Raym. 1032.

<sup>i</sup> *Posslethwayte against Parkes*, E. 6 Geo. III. 3 Bur. Mansf. 1878.

<sup>k</sup> *Moor*, 214.

*The Law of Descents, so far as it relates to Parents and Children.*

**A**LL inheritances lineally descend to the issue of the person last actually seised, *in infinitum* ; but never lineally ascend. No person can be actually and completely the heir of another, until the ancestor is dead. Whilst the ancestor is living, the person who is the next in the line of succession, is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor ; as the eldest son, or his issue ; who must by the course of the common law be heirs to the father whenever he happens to die. Heirs presumptive are such, who if the ancestor should die immediately, would in the present circumstances of things be his heirs ; but whose right of inheritance may be defeated by the contingency of some nearer heir being born ; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child ; or a daughter, whose present hopes may be cut off by the birth of a son. Nay, even if the estate had descended by the death of the owner, to such brother or nephew, or daughter ; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child ; and in the latter, it shall also be totally divested by the birth of a posthumous son \*.—The total exclusion of parents, as well as all lineal ancestors, from succeeding to a real estate of their offspring, is peculiar to the English laws, and such as are derived from the same sources. An inheritance in lands or tenements cannot be derived from him who hath not had actual seisin of such lands or tenements ; which seisin is made either by his own en-

\* Bro. tit. Descent, 58.

trance thereon, or by the possession of his own or his ancestor's lessee for years ; or by receiving rent from a lessee <sup>f</sup>. Or in hereditaments incorporeal, he must have what is deemed equivalent to corporal seisin ; such as the receipt of rent, the presentation to a church in case of an advowson, and the death of the incumbent ; but the bare title, or right of being seised, does not make him an ancestor in the property, except in an advowson, where the right of presentation has not been exercised by the ancestors, because no vacancy has happened.—Sons inherit in preference to daughters. Thus, if a man dies, leaving two sons and two daughters, his eldest son enters on the inheritance ; who, if he dies without issue, is succeeded by his brother : neither of the daughters inheriting unless their second brother dies without issue, and then they jointly enter on the estate in coparcenary <sup>g</sup>. The true reason of preferring the males must be deduced from feudal principles, the Roman law making no such distinction. By the genuine and original policy of the feudal constitution, no females could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established <sup>h</sup>. But our law does not extend to a total exclusion of females, as the Salic law and others, where feuds were more strictly retained ; it only postpones them to males ; for though daughters are excluded by sons, yet they succeed before any collateral relations. It appears therefore, that the eldest male in equal degree succeeds, to the exclusion of the rest, but that females inherit all alike. This right of primogeniture in males, seems anciently to have obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance <sup>i</sup>. In the same manner as with us, by the laws of king Henry the First, the eldest

<sup>f</sup> Co. Lit. 15.

<sup>g</sup> See page 117.

<sup>h</sup> See pages 107—110.

<sup>i</sup> Selden de succ. Ebr. c. 5.

son had the capital fee, or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion when the estate descended in coparcenary<sup>1</sup>. The Greeks, the Romans, the Britons, the Saxons, and originally even the feudists divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way, and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartable, or, (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was further enforced by the inconvenience that attended the splitting of estates; namely, the division of the military services; the multitude of infant tenants incapable of performing any duty; the consequent weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments<sup>2</sup>. These reasons occasioned an almost total change in the method of feudal inheritances abroad, so that the eldest male began universally to succeed to the whole of the lands in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror<sup>3</sup>.—Soccage estates, as they were not held for such purposes as feudal ones, the same reasons for descent by primogeniture could not operate towards them. Such estates therefore in ancient times frequently descended to all the sons equally; but they afterwards became subject to the

<sup>1</sup> Glanv. l. 7. c. 3.<sup>2</sup> H. H. C. L. 221.<sup>3</sup> Blackst. b. II.

same mode of descent as lands in chivalry, and at this time the law so determined it, except where gavelkind tenure prevailed, which is in the county of Kent alone. But with regard to females, the law has ever remained uniform and fixed; they being alike incapable of performing personal service, there seemed to be no good reason for preferring the eldest. And the other principal purpose the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown, wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of the sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour; for if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters, the eldest shall not of course be countess, but the dignity is in suspense or obedience till the king shall declare his pleasure. For he being the fountain of honour, may confer it on which of them he pleases<sup>m</sup>. The child, grandchild, great grandchild, and so on *in infinitum* of the eldest son, succeeds before the youngest son, and these are each entitled to the precise quantum which their ancestor would be were he living. This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males; to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own rights, as next of kin to the ancestor, without any respect to the stocks from whence they sprang; and those children were partly male and partly

<sup>m</sup> Co. Litt. 165.

female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first born among persons of equal degree; whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady. The issue of the eldest son excludes all other pretenders, as the son himself, if living, would have done the same. And among these several issues, or representatives of the respective roots, the same preference to males, and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased: as, if a man hath two sons, A. and B. and A. dies, leaving two sons, and then the grandfather dies. In such case the eldest son of A. shall succeed to the whole of his grandfather's estate; and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But if a man has only three daughters, C. D. and E. and C. dies, leaving two sons; D. leaving two daughters; and E. having a daughter, and a son who is younger than his sister; here, when the grandfather is dead, the eldest son of C. shall succeed to one third, in exclusion of the younger; the two daughters of D. in partnership to another third; and the son of E. to the remaining third, in exclusion of his elder sister; and the same right of representation guided and restrained by the same rules of descent, prevails downwards *in infinitum* <sup>a</sup>.

The law of collateral inheritance requires, that upon failure of issue in the last proprietor, the estate shall descend

<sup>a</sup> Blackst. b. II. c. 14.

to the blood of the first purchaser ; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law, to have originally descended.—If a man seised of an estate which hath descended to him by a course of inheritance, dies, leaving no lineal heirs, none can inherit but the heirs of those through whom the inheritance hath passed, for none else have any of the blood of the first purchaser. If lands come to Charles Rowe by his mother Margaret Twiss, no relation of his father can ever be heir of those lands, and so *vice versa*, if they descended from his father Peter Rowe, no relation of his mother shall ever be admitted thereto ; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood ; and so if the estate descended from his father's father, the relations of his father's mother shall for the same reason never be admitted ; but only those of his father's father. In this manner is an estate to be traced back in failure of lineal heirs ; and none but the blood of the ancestor is suffered to inherit. But if the manner in which the inheritance became conveyed to the first proprietor can be traced no farther, and it cannot be determined whether the first possessor of that blood inherited from his father or his mother, the descendants of either are in their due order heirs. Or if it be traced to a first grantee who took it by the general law, as a feud of indefinite antiquity, then the law admits of representatives of such first ancestor, whether paternal or maternal, to be in their due order the heirs. Thus if George Toms die without issue, his estate shall descend to his next elder brother, and pass from him to the next. On failure of brothers, and their children, to his sisters in equal shares, next to their issue : the children of each sister representing their respective mother, and inheriting from her : on failure of sisters, and sister's children, it shall descend to the uncle

of George Toms, the lineal descendant of his grandfather; and so on *in infinitum*.—The heir need not be the kinsman absolutely, but only *sub modo*, or the nearest kinsman of the whole blood; for a much nearer kinsman of the half blood is entirely excluded, and a distant kinsman of the half blood admitted.—A kinsman of the whole blood is one derived not only from the same ancestor, but from the same couple of ancestors: for as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole and entire blood with another, who hath, so far as the distance of degrees will admit, all the same ingredients in the composition of his blood that the other hath. Thus the blood of George Toms being composed of those of Philip Toms his father, and Mary Blanche his mother, therefore his brother Andrew being descended from both the same parents, hath entirely the same blood with George Toms; or, he is his brother of the whole blood. But if after the death of their father, Mary Blanche marries a second husband, and has issue by him; that issue hath only half the same ingredients with George Toms; and for that reason they can never inherit to each other. So likewise if the father has two sons, Paul and Nathaniel, by different wives, they are not brothers of the whole blood, and therefore cannot inherit to each other; but the estate shall sooner escheat to the lord, for want of heirs, because he is not of the whole blood to the last possessor. But if the father dies, and his lands descend to his eldest son, who dies without entering on them, then the other son, by the second venter, or wife, may inherit as heir to the father, who was the person last actually seized<sup>o</sup>. George and Andrew are brothers by the same father and mother: their mother marries a second husband, by whom she has another son. George dies seized

<sup>o</sup> Blackst. b. II. c. 14. H. H. C. L. 238.



of lands, but it cannot be determined whether they descended to him from his father or mother : his brother Andrew is his undoubted heir, being of the whole blood, and therefore the undoubted descendant from the first purchaser, whether it were of the line of the father or mother ; but if Andrew shall die before George, without leaving issue, the mother's son by her second marriage, who is a brother of the half blood to George and Andrew, cannot be heir, for he cannot prove his descent from the first purchaser who is unknown ; nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely not to be descended from the line of the first purchaser, as to be descended therefrom ; and therefore the estate shall go to the nearest relation possessed of this presumptive proof, the whole blood <sup>p</sup>.—The relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all ; and the relations of the father's father, before those of the father's mother, and so on <sup>q</sup>. In all cases in which it is uncertain whether the husband or wife was the first purchaser of an inheritance that descends to their children ; if upon failure of their issue an heir is sought from a collateral line, the law judges it more likely that the lands should have descended to the last tenant from his male line, than from his female ancestors ; or, from the father rather than from the mother ; from the father's father, rather than from the father's mother. Therefore they trace back the inheritance through the male line. But whenever lands have descended to a man unquestionably by the mother's side, this rule is totally reversed, and no relation of his by the father's side, as such, can ever be admitted to the lands in question, because he cannot possibly be of the blood of the first purchaser. So in an estate newly purchased to be held *ut feudum*

<sup>p</sup> Blackst. u. l.<sup>q</sup> Litt. sect. 4.

*antiquum*, here the right of inheritance first runs up all the father's side, with a preference to the male stock in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side, leaving no place untried in order to find heirs that may by possibility be derived from the original purchasers<sup>r</sup>.

Thomas Herbert, Esq; being seised in fee of certain lands, by his last will and testament bequeathed to his wife and her heirs, such part of his real estate as he had any power to dispose of by will. He died, leaving a wife, and Thomas Herbert, his only child by her, his heir at law, an infant. The widow entered upon and enjoyed the real estates; and three years afterwards intermarried with Thomas Powell, Esq; but previous thereto conveyed the real estate which she held under her first husband's will to trustees for the use of herself, and her assigns for life, afterwards to Thomas Herbert her son, with certain limitations and restrictions, reserving to herself a power of devising by a writing purporting to be her will, the contingent remainder of such real estate. Accordingly she afterwards bequeathed the real estate to her son, his heirs, and assigns for ever. She died two months after, leaving her son Thomas Herbert, an infant: who soon after died intestate, without issue, unmarried, and within age, leaving Roger Powell, Esq; his heir by the paternal line, and Lucy Allen, widow, his heir, by the maternal line. After the death of Thomas the son, Roger Powell entered and received the rents and profits during his life; but in 1741 Lucy Allen filed her bill in chancery, against Roger Powell and others, praying to be let into possession. The original cause was heard in 1755, before lord Hardwicke, who directed a case to be made, and the two

following questions to be stated for the opinion of the court of King's Bench. 1. Whether by the will of Thomas Herbert the father, (husband of Elizabeth Herbert, afterwards Powell) the estate in question passed to the said Elizabeth in fee? 2. Whether it descended upon the death of Thomas Herbert, the son, to his heirs *ex parte paterna*; or to his heirs *ex parte materna*? On the 27th of November 1759, the judges of that court certified their opinion as follows. Having heard council on both sides, and considered of this case, we are of opinion, that the estate in question in this cause, passed by the will of Thomas Herbert the father, to the said Elizabeth in fee. We are also of opinion, that Thomas Herbert the son did not take the said estate from his mother by purchase, but by descent, consequently upon his death it descended to his heir *ex parte materna*. Lord keeper Henley having afterwards decreed accordingly, the defendants being the representatives of Roger Powell, appealed to the house of lords, but before hearing it was compromised, by a composition as to the retrospective account of the profits of the estate, but that the decree should stand with regard to the estate itself\*. An estate may be acquired by descent or by purchase; if by purchase, it acquires a new inheritable quality, and is descendible to the owner's blood in general, and not to the blood of some particular ancestor. For when a man takes an estate by purchase, he takes it not *ut feudum paternum*, or *maternum*, which would descend only to the heirs by the father's or the mother's side; but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs generally, first of the paternal, and then of the maternal line. So also an estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will.

\* Hunt and another, against the Earl of Wilschelsea and another. M. 33 Geo. II. 2 Bur. Mans. 879.

For if the ancestor by any deed, obligation, covenant, or the like, binds himself and his heirs, and dies : this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he had any estate of inheritance vested in him, (or in some other in trust for him) by descent from that ancestor, sufficient to answer the charge, whether he remains in possession, or hath aliened it before action brought<sup>t</sup>. Which sufficient estate is in law called *assets*, from the French word *assez*, enough<sup>u</sup>. Therefore if a man covenants for himself and his heirs to keep my house in repair, I can then, and then only, compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets* by descent<sup>v</sup>. A man had issue a son and a daughter, and devised his lands to his son in tail ; and if he died without issue, that it should remain to the next of his name, and died. The son died without issue, the daughter being then married, The question was whether she should have the lands : and the court decreed, that as she had lost her name by her marriage, it should go to the next heir male of the name ; but if she had not changed her name by marriage, she should have had it, for she then was the next of the name<sup>w</sup>.

“ All children inheritors which shall be born without the  
 “ liegeance of the king of England, shall have the same  
 “ benefit of inheritance as if they were born within the  
 “ king’s liegeance ; so always that the mothers of such chil-  
 “ dren do pass the sea by the licence and wills of their hus-  
 “ bands. And if it be alledged against any such born be-

<sup>t</sup> 29 Car. II. c. 3.<sup>u</sup> Fin. Law, 119.<sup>v</sup> Fin. R. 86. Blackst.<sup>w</sup> II. c. 15.

Case of Benn and Smith, Cro. Eliz. 532.

“ yond the sea, that he is a bastard, it shall be commanded  
 “ to the bishop of the place where the demand is, to certify  
 “ to the king’s court where the plea thereof hangeth, as is  
 “ used in the case of bastardy alledged against them which  
 “ were born in England <sup>x</sup>,” Children not demanding their  
 legacies of their fathers when they come of age or after, is  
 no discharge of them. And the father is bound to main-  
 tain them during their minority. And their portions given  
 by a stranger do not at all exonerate him. And where they  
 become fit for service, and serve their fathers, their service  
 has been deemed by the court to be of more worth than the  
 interest of a legacy of 50*l*. and so interest was allowed. But  
 where a daughter married, and she and her husband had a  
 year’s board after marriage, the father must be allowed for  
 it, unless an agreement be proved to the contrary <sup>y</sup>.—A de-  
 vised 250*l*. to his son, and left his wife executrix, who  
 married another husband. On a bill brought against them  
 by the son for the legacy, the defendants would have dis-  
 counted maintenance and education, but the court would  
 not permit it, so as to diminish the principal sum; for it  
 was said, the mother ought to maintain the child <sup>z</sup>.—But a  
 sum of money paid for binding the son out apprentice, may  
 be deducted from a principal sum <sup>a</sup>.—But where a father  
 died, leaving a son of two years old, to whom as heir at law  
 the rents of 33*l*. per annum descended, the mother, who  
 received the rents till the death of the child, which happened  
 when he had attained to eighteen years, was allowed for his  
 maintenance <sup>b</sup>.

An heir at law may be a witness concerning the title to  
 land. But the remainder man cannot, for he hath a pre-  
 sent interest; but the heirship is a mere contingency <sup>c</sup>.

<sup>x</sup> 25 Edw. III. stat. 2.

<sup>y</sup> 3 Ch. R. 168.

<sup>z</sup> 2 Vent. 353.

<sup>a</sup> Ibid.

<sup>b</sup> Ch. R. 164.

<sup>c</sup> Sid. 315.

By a devise of all his goods to his children, a bastard signé shall take a portion <sup>c</sup>.

*Additions to a Name.*

**W**HERE a father hath the same name, and the same addition with a defendant, being his son, the action is abatable, unless it add the addition of *the younger*, to the other additions. But where the father is the defendant, there is no need of the addition of *the elder* <sup>d</sup>.

*Of Gevelkind Lands, and the Custom of Borough English.*

**T**HE only traces of this kind of tenure are now to be found in Kent: and it is the opinion of a learned antiquarian, that this kind of tenure prevailed universally in the kingdom before the Norman conquest <sup>e</sup>. The distinguishing properties of this tenure are various. Some of the principal are as follow: (1). The tenant is of sufficient years to alienate his estate by feoffment at the age of fifteen, (2). The estate does not escheat in case of an attainder and execution for felony; their maxim being, “the father to the bough, the son to the plough <sup>f</sup>.” (3). In most places the tenant had a power of devising lands by will before the statute for that purpose was made <sup>h</sup>. (4). The lands descend not to the eldest, youngest, or any one son only, but to all the sons together <sup>i</sup>, which was indeed anciently the most usual course of descent all over England; though in particular places particular customs prevailed <sup>k</sup>. Anciently lands in Wales were equally divided among all the issue

<sup>c</sup> Moorf. 10. Bar & Fem. <sup>d</sup> 2 Hawk. 187. <sup>e</sup> Seld. Analect.

<sup>f</sup> 2. c. 7.

<sup>g</sup> Lamb. Perem. 614.

<sup>h</sup> Ibid. 634.

<sup>i</sup> Cro.

Car. 561.

<sup>j</sup> F. N. B. 198, Litt. 1. 219.

<sup>k</sup> Blackst. b. II. c. 6,

male, and did not descend to the eldest son alone, but by statute 27 Hen. VIII. c. 26. the English rules of descent were extended into that principality, so that their lands from that period have been inherited by the eldest son. If a man seised of lands in gavelkind, gives or devises them to a man, and his eldest heirs, this does not alter the customary inheritance, or hinder the descent, according to the rules in gavelkind, for that can be done by act of parliament only<sup>k</sup>. Heirs in gavelkind shall make partition as parceners, and a writ of partition lies between them as it does between parceners. And in the declaration upon such writ, the custom must be mentioned; that the land is of gavelkind, but they need not prescribe; for though the custom as different from the general law of the kingdom, must be taken notice of to the judges, yet there is no necessity for prescribing, because it is *lex loci* l. And by a custom which prevails in certain ancient boroughs, called borough English, the youngest son shall inherit the lands of which his father dies seised, either in fee or fee-tail<sup>m</sup>.—An ejectment was brought for certain copyhold lands within the manor of Barnes in the county of Surry, in which manor there is a custom of borough English. William Clymer made out his title from a regular and undisputed will of his grandfather John Clymer, dated Feb. 17, 1743, and executed in the presence of three witnesses, disposing of his freehold as well as copyhold estate to his eldest son John Clymer, the father of the abovenamed William Clymer. The testator John Clymer the elder, having previously surrendered the copyhold to the use of his will. The title of the defendants, who were purchasers under another William Clymer, second and youngest son of John the elder, and uncle to William the plaintiff, depended upon another sub-

<sup>k</sup> Co. Litt. 27.  
Noy. 106.

<sup>l</sup> 14 Vinet. tit. Gavelk.

<sup>m</sup> Litt. sect. 165.

sequent will, or instrument which they called a will, made by the said John the elder, as they alledged on the 20th of September 1745, which they contended was at least a revocation of his former will in 1743; and if it be only a revocation of the former will, then William the youngest son of John must inherit as heir in borough English. This will or instrument of 1745, which was not under seal, was all written by one William Medlicott; who was son-in-law to the testator, having married his only daughter Amey; to whom, and to her heirs forever, the copyhold lands in question were thereby conveyed. And it was witnessed by William Medlicott and one Elizabeth Mitchell. Upon the death of John Clymer the elder in 1746, his second son William Clymer was admitted to this copyhold estate as heir in borough English: the abovementioned will of 1743 being then unknown to every body except William Medlicott, who had it in his possession, but secreted it. John Clymer the elder was therefore thought to have died intestate. William the son enjoyed the estate till 1751, and afterwards alienated it. Whilst these transactions happened, William Clymer, the son of John Clymer the younger, was at first a minor, then at sea, always poor, and remained ignorant of the will in 1743, till the death of Medlicott, who produced it when dying, and directed it to be delivered to the party mentioned therein. William Medlicott died in May 1747; he had the custody of both wills till a few weeks before his death. The latter will was found among his papers; the former was delivered by him to one Edwards, about three weeks before his death; and it was about three months after delivered to William Clymer, who was then about two years under age, but who proved it in 1751. Fourteen or fifteen years elapsed from the death of John Clymer the testator, before this ejectment was brought, during which time his uncle William, or the purchaser  
under



under him, had been in quiet possession. To encounter the evidence of this will, the defendants produced the instrument of 1745, and both the witnesses to it being dead, they proved their hand-writing, and also the hand-writing of John Clymer the elder, in the common and ordinary form. Whereupon the plaintiff's council insisted, that this will, or instrument, was in the first place an absolute forgery; and in the next place, that in point of law it could not operate as a revocation of the will in 1743: and they called Mary Victor, sister to the said William Medlicott, who swore, that whilst she was attending her brother in his last illness, and about three weeks before his death he pulled out of his bosom the will of 1743, and said it was the true will of John Clymer, and then delivered it to her, with directions to deliver it over to William Clymer, the son of John Clymer the younger, who was the legatee: and she added, that one Edwards was present at the time. This Edwards had been already called on the part of the defendants, to prove the hand-writing of Elizabeth Mitchell, one of the witnesses to the instrument of 1745. On being cross-examined on the part of the plaintiff, he confirmed Mary Victor's evidence, that Medlicott did pull the will of 1743 out of his bosom, and gave it to her, with such directions as she had deposed to. Upon Mary Victor's cross-examination by the council for the defendants, she not only persisted in what she had before deposed, but also added, that at the same time that William Medlicott produced the will of 1743, as the true will of John Clymer the elder, he acknowledged and declared to her that the will, or instrument, of 1745, was forged by himself. The judge and jury (a special one) perused and examined the two instruments, and took notice of the circumstances of the latter being all in the hand-writing of this Medlicott himself, and disposing of a fee to Medlicott's own wife. And upon the whole they were all of opinion that it  
was

was a forgery. And the judge (lord chief justice Wilkes) directed the jury to find for the plaintiff, which they did. A motion was made in the court of King's Bench for a new trial, upon the plea of a misdirection of the judge who tried the cause upon a point of evidence. By lord Mansfield. There is no doubt as to the will of 1743, which is the plaintiff's title; the only answer to it which the defendants now alledge is, that the instrument of 1745 has revoked it; and they do not suggest that they can give any new evidence in support of this instrument, or the point of revocation. The jury have found for the plaintiff, consequently that the will of 1743 was not revoked. Lord chief justice Wilkes is satisfied with the verdict. This motion, therefore, and the argument in support of it, as there is no pretence that the defendants can amend their case by a new trial, is in the nature of an appeal from his opinion. The will of 1743 is set up after fifteen years; it was necessary to shew how it was secreted, and how discovered. The declaration of Medlicott in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence. The instrument of 1745 was equally in his custody, and secreted. The account he gave of it in his last moments is equally proper. Even though it had been upon an examination by the plaintiff (especially as it was all written, and was witnessed by him, and gave the premises in question to his wife) as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice, and ease his conscience; I am of opinion the evidence was proper to be left to the jury. But independent of this declaration, forgery or fraud was apparent. Medlicott appears to have been a bad man. It is all written by him, and gives the fee to his wife in prejudice of John Clymer, the testator's male issue; it is worded as an irrevocable

cable settlement, without cause or consideration. Medlicott never dared to produce it, and chose rather to conceal the will of 1743, that the younger son might be admitted, and possess the premises. And still further, this paper is no revocation; it is no will, and therefore cannot direct the uses of the surrender. It is no conveyance, it is no agreement with any body. It doth not purport having been delivered to or for the use of any body. There is no proof that it was out of the custody of John Clymer before his death. It ought not to have been out of his custody, because it is voluntary, and without any consideration. He could not have been obliged to perform it. Then it amounts to no more than his bare saying, that he intended to make a will, or surrender to the use of his daughter in fee, and did neither. An intention to revoke by a future act which a man cannot be compelled to perform, is no revocation till the act is done. All the cases are so, and the reason is evident. The three other judges declared their entire concurrence, but declined expatiating, as lord Mansfield had so very fully gone through it<sup>m</sup>.

### *Contingent Remainders.*

**A** Remainder to a man's eldest son is a good remainder, though at the time of making it hath no son. But such is the nice, and perhaps it may be thought in this instance frivolous distinction of the law, if such remainder be limited to a man's son *non in esse*, by a particular name, as Richard or John, it is a bad remainder, for the law deems it too remote a possibility, that he should not only have a son, but a son of a particular name.<sup>n</sup> Lands devised to such unborn son of a feme-covert, as shall first attain the

<sup>m</sup> Wright on demise of William Clymer against Littler and others. M. 2 Geo. III. 3 Bur. Mansf. 1244.      <sup>n</sup> 5 Rep. 51.

age of twenty-one years, and to his heirs, is a good executory devise. The utmost extent of which contingency ; or the longest extent of time that can happen before the estate can vest, is, the life of the mother, and the subsequent infancy of her son, which is the life in being, in whom it vests immediately ; and twenty-one years after the determination of that life ; and this is the utmost length that has ever been allowed for the contingency of an executory devise<sup>p</sup>. Contingent remainders may be defeated, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested<sup>q</sup>. Therefore when there is tenant for life, with diverse remainders in contingency ; he may not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate, before any of those remainders vest ; the consequence of which is, that he utterly defeats them all : as, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born surrenders his life estate ; he by that means defeats the remainder in tail to his son ; for his son not being *in esse*, when the particular estate determined, the remainder could not then vest ; and as it could not vest then, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders, in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his determines. If therefore his estate for life determines otherwise than by his death, their estate for the residue of his natural life will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency<sup>r</sup>.

<sup>p</sup> Forr. 232.<sup>q</sup> 1 Rep. 66. 135.<sup>r</sup> Moor. 486. 2 Rolls.

Abr. 797. 2 Sid. 259. 2 Chan. Rep. 170. Blackst. b. II. c. 11.

*Corruption of Blood.*

**N**Othing but the renovating power of an act of parliament can restore inheritable qualities to corrupted blood. The king by pardoning the offender may remit his public punishment; but the king alone has no right to vest in a man attainted of high treason a right of transmitting his inheritance to his heirs, for by such attainder the blood is so far stained or corrupted, that the party loses all the nobility or gentility he might have had before, and becomes ignoble, so that he can neither inherit as heir to an ancestor, nor have an heir<sup>s</sup>. The king may remit a forfeiture in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood, for therein a third person has an interest; namely, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and is afterwards pardoned by the king, this son can never inherit to his father, or father's ancestors: because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if a son is born after the pardon, he may inherit, because by the pardon he is made a new man, and may convey new inheritable blood to his after-born children<sup>t</sup>. If a man hath issue a son, and is attainted, and is afterwards pardoned, and then has issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir: neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord. Though had the elder died without issue in the life-time of the father,

<sup>s</sup> 2 Hawk. 456.<sup>t</sup> Co. Litt. 392.

the younger son born after the pardon might well have inherited, he having no corruption of blood. So if a man hath issue two sons, and the elder in the life of the father hath issue, and then is attainted and executed, and afterwards the father dies. The lands of the father shall not descend to the younger son, for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the lands shall escheat to the lord; but if the eldest son leave no issue, the younger shall inherit. If the father be attainted, and dies during the life of the grandfather, yet the son shall not inherit to the grandfather, because he must represent his father, who cannot be represented.—The father is seised of lands holden of A. the son is attainted of high treason; the father dies; the lands shall escheat to A, because of corruption of blood, the father dying without heir; and the king cannot have the land, because the son never had any thing to forfeit; but the king shall have the escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden<sup>v</sup>; but if the ancestor be attainted, his sons born before the attainder may be heirs to each other, because the blood was inheritable when imparted to them<sup>w</sup>.

### *Children of Aliens.*

**A** LIENS can neither hold lands by purchase, nor by inheritance, consequently they can have no legal heirs<sup>x</sup>. To remove these heavy grievances on them, they may be made denizens by the king's letters patent, after which they are privileged to purchase lands. But the son born before such denization, must not by the common law inherit those

<sup>u</sup> Co. Litt. 8.

<sup>v</sup> Ibid. 13.

<sup>w</sup> Blackst. b. II. c. 15. Co. Litt. 8.

Dyer, 48. 1 H. P. C. 357, 8. 3 Inst. 233.

<sup>x</sup> Co. Lit. 2. 1 Lev. 59.

lands ; but a son born afterwards may, to the exclusion of his elder brother, though living, which is different from the case of attainder. For the father before denization was considered as having no inheritable blood to impart to his issue : which quality it acquires by denization, and transmits to all his subsequent posterity. But naturalization by act of parliament takes a more ample scope, having a retrospective energy, and imparting to his blood an inheritable quality *ab initio*. It was formerly held that if an alien come into England, and there have issue two sons, who are thereby natural born subjects, and one of them purchases lands and dies, yet his surviving brother cannot be his heir. For their father, who is their common stock, or *commune vinculum*, hath no inheritable blood in himself, consequently the law knows no affinity between his offspring, because they can derive their descent from no ancestor ; therefore if no lineal descendants of the purchasing brother can be found, the land shall escheat to the lord of the fee<sup>y</sup> ; but this opinion hath been controverted, and overruled by modern lawyers : and the sons of an alien, born under the king's allegiance, may inherit to each other<sup>z</sup>. The extension of commerce for a century past has made it advisable for the legislature to pay some particular attention to the interests of aliens, particularly when the destructive policy of a vain-glorious potentate in a rival kingdom was harrassing some of his most valuable subjects, and compelling them to quit their country, and seek an asylum under a more benign government. Accordingly an act was passed, A. D. 1700<sup>a</sup>, enacting, that all persons, being natural-born subjects of the king, may inherit, and make their titles by descent from any of their ancestors lineal or collateral, although their father, or mother, or other ancestor, by, from, through, or under whom they

<sup>y</sup> Co. Lit. 129.

<sup>z</sup> 2 Kent. 473.

<sup>1</sup> Lev. 59.

<sup>2</sup> Sid. 293.

<sup>a</sup> 11 & 12 W. c. 6.

derive their pedigrees, were born out of the dominions of the king of England. But an unforeseen consequence from this act presented itself after some time; for thereby a younger son, born in Great Britain, or its dependencies, might inherit, to the exclusion of his elder brother born in foreign parts; but should such elder brother settle in England, and have a son, such son might claim the inheritance occupied by his uncle; therefore a subsequent act<sup>b</sup> enacted, that no right of inheritance should accrue by virtue of the former statute, to any persons whatsoever, unless they are in being, and capable to take as heirs, at the death of the person last seised: with an exception, however, to the case where lands shall descend to the daughter of an alien, which daughter shall resign such inheritance to her after-born brother, or divide it with her after-born sister, according to the usual mode of descents by the common law, which has been already laid down<sup>c</sup>.

All those are natural born subjects, whose parents, at the time of their birth, were under the actual obedience of the king of Great Britain, and whose place of birth was within his dominions<sup>d</sup>. If a king of England makes a new conquest, the persons there born are his subjects: but if the place be retaken, the persons born there afterwards are aliens<sup>e</sup>. If an alien has issue by an English woman out of the king's lineage, the issue shall be alien, though she is a natural subject, for she is *sub potestate viri*<sup>f</sup>. But if an English merchant goes beyond sea, and takes an alien wife, the issue shall inherit him.—An English merchant died in Poland, leaving his wife, who was an alien, with child. This child was adjudged to be a subject born, for the child

<sup>b</sup> 25 G. II. c. 39.

<sup>c</sup> See page 368.

<sup>d</sup> 7 Co. 18.

<sup>e</sup> Dyer, 224; Vaugh. 281, 282.

<sup>f</sup> 1 Vent. 422.



shall be of the condition of his father<sup>a</sup>.—A denizen is an alien enfranchised by the king's charter, and enabled to purchase and possess lands, and to be capable of any office or dignity as a native subject; but such an one cannot inherit lands by descent<sup>b</sup>.

*Posthumous and supposititious Children.*

**A** Child born so soon after the death of the husband, that by the usual course of gestation it may be presumed to have been begotten by him, is equally legitimate as if born before his death. In case a widow declares herself with child, in order to produce a supposititious heir to an estate, the presumptive heir will be allowed by the common law a writ *de ventre inspiciendo*, to examine whether she be with child or not. And if she be, to keep her under proper restraint till she be delivered; but if upon full examination she be pronounced not pregnant, the presumptive heir may claim to be admitted to the estate, though liable to lose it again on the birth of a child, within forty weeks from the death of the husband<sup>i</sup>.—Percival Willoughby, and Bridget his wife, one of the coheirs of Sir Francis Willoughby, prayed a writ out of the chancery *de ventre inspiciendo*, to Dorothy, the wife of the said Sir Francis deceased, who dying seized of a great inheritance, leaving five daughters, the eldest of whom was married to Percival Willoughby, and joined with him in this prayer. And it was founded on the widow pretending herself to be with child by Sir Francis, which if it were a son, all the five sisters would lose the inheritance descending to them. And they further prayed, that the writ might be directed to the sheriff of London, that he should

<sup>a</sup> Cro. Car. 601. 2. 1 Sid. 198.

<sup>b</sup> 27 Hen. VIII. c. 24.

<sup>i</sup> Co. Litt. 8. Brañ. l. 2. c. 32.

cause the said Dorothy to be viewed by twelve knights, and searched by twelve women in presence of the knights, *et ad sciscitandum ubi era, et ventrem inspiciendum*, whether she were with child, and to certify the same into the court of Common Pleas. And if she were with child, to certify for how long time in their judgments, and when she would be delivered. Whereupon the sheriff accordingly caused her to be searched, and returned that she was twenty weeks gone with child, and that within twenty weeks she would be delivered. Whereupon another writ issued out of the Common Pleas, commanding the sheriff safely to keep her in such a house, and that the doors should be well guarded, and that every day he should cause her to be viewed by some of the women named in the writ (wherein ten were named); and when she should be delivered, that some of them should be with her to view the birth, whether it be male or female, to the intent there should not be any falsity. And upon this writ the sheriff returned, that accordingly he had done, and that such a day she was delivered of a daughter<sup>p</sup>.

But if a man dies, and his widow soon after marries again, and a child is born within such a time as that, by the course of nature, it might be the child of either husband; in this case it is said to be more than ordinarily legitimate, for it may, when arrived at years of discretion, choose which of the fathers he or she pleases<sup>q</sup>. This was an inconvenience of such magnitude, that the civil law prohibited a widow from marrying *infra annum luctus*<sup>r</sup>, which year consisted only of ten months, as may be gathered from Ovid<sup>s</sup>. From the Romans this law seems to have been received into this island; for the same restraint was laid upon widows in the Saxon and Danish times, and we find it expressly enacted,

<sup>p</sup> E. 39 Eliz. Cro. Eliz. 566.

<sup>q</sup> Co. Litt. 8.

<sup>r</sup> Roll's Ab. 357.

See page 73.

<sup>s</sup> Fasti. lib. 1. 27.

A. D. 1008.—Alphonfus Theaker, cousin and heir of William Theaker, after the death of the said William, who died without issue, procured out of the chancery a writ *de ventre inspiciendo*, of Mary the wife of the said William, she being then supposed to be *ensient* by him; and within one week after the death of her husband, married with one John Duncombe. This writ was directed to the sheriff of London, to cause the said Mary to be searched, whether she were with child by the deceased William Theaker, and if with child, when she would be delivered. No mention being made of her second marriage. And this writ was according to the precedent in the 39th Elizabeth, of the like writ against the lady Willoughby, and was returnable in the Common Pleas. The sheriff returned, that he had caused her to be searched, and returned the inquisition, that by such persons he caused her to be searched, and found her to be *ensient*, and that she would be delivered within twenty weeks. Alphonfus Theaker, the petitioner, then prayed a second writ out of the Common Pleas, to be directed to the sheriff of Surry, because she was moved by her husband to Wandsworth, in that county, and there inhabited; that the sheriff might take her into his custody, and keep her until she was delivered of her child, that there might not appear to be any false or supposititious birth; and that in the mean time the sheriff might cause her to be viewed every day by certain matrons named by the court in the writ, and that some of them might be present at the birth of the child, according to the precedent of lady Willoughby. But because in that case the lady was a widow, and so such a course might well be observed; but here she was a feme-covert, who ought to cohabit with her husband; they would not take such a course

† Sit omnis vidua sine marito duodecim menses. L. L. Ethelt. L. L. Canut. 78.

with her, but left her with her husband, he entering into a recognizance that she should not remove from the house wherein they then inhabited, and that one or two of the women returned by the sheriff should see her every day, and that two or three of them should be present at her travel: for it was said that this issue might be well said to be the child of the first husband, and should inherit his land. So that if there was any false or supposititious birth, the cousin and heir might be disinherited. Wherefore a writ was accordingly awarded to the sheriff of Surry, to cause her to be seen every day until her delivery, by two, at least, of the women returned by him; and that three of them, at the least, should be present with her at the delivery, so as no falsehood might be in the birth. After which course was observed, she was delivered of a female child, who was afterwards, by inquisition, found to be the daughter and heir of the said William Theaker deceased<sup>u</sup>. The whole proceeding in this remarkable case, says Mr. Nelson<sup>v</sup>, seems to be deduced from the rules of the civil law, which is particularly express and punctual in this behalf. For by that law the woman who supposes herself to be with child, must intimate it twice in every month to those who are nearest concerned, that they may send five women to inspect her; and she must do the same for the space of a month before she expects to be delivered, that they may send some person to be there at that time. The judge may appoint in what house she may dwell; and the room wherein she lies must be searched, and if there is more than one door therein, it must be nailed up; and three men, and as many women, must be set to watch her as often as she comes into the chamber: who are also to search all persons who come into the house and chamber. When she is in labour, five women

<sup>u</sup> E 22 Ja. I. Cro. Ja. 685.

<sup>v</sup> Rights of the Clergy, tit. Bastards.

sent by the party next concerned must be witnesses to the birth; of which time of delivery they must have notice before hand; and there must be no more in the chamber at that time, but ten women, two midwives, and six servants, of which none must be with child; and therefore may be searched before they go in: there must be three lights in the room: the child when born must be shewed to those concerned: the judge must appoint who shall keep it, unless the deceased father hath otherwise appointed, and it must be shewed twice in a month till it is three months old: and afterwards once in a month till it is six months old; and once in two months till it is a year old: and from that age once in two months till it can speak. And if any thing is done contrary to the premises, or not permitted to be done, then upon proof thereof, the child is not to be admitted to the possession of the estate.

By the civil law, such as were born in the beginning of the 11th month after the decease of their mother's husband, were to be accounted legitimate, but such as were born in the end thereof were to be accounted bastards; but a remarkable instance is given of a decision contrary to this established law. A widow in Paris was delivered of a child the 14th month after her husband's death, yet the good repute of this woman's continence prevailed so much against the letter of the law, that the court judged the causes of childbirth to be sometimes extraordinary; the woman to be chaste, and the child legitimate. But this, as the gloss which relates this case adds, ought not to be easily drawn into example<sup>w</sup>. In the case of Alsop and Bowtrell<sup>x</sup>, ejectment for lands in Munden, in the county of Hertford; the question upon evidence to the Jury was, whether Edmund Andrews, dying the twenty-third of March, and his wife being with child,

<sup>w</sup> Cod. 482.<sup>x</sup> M. 7 Ja. I. Cro. Ja. 541.

but not delivered until the fifth of January following, (which was forty weeks and nine days, and then delivered of a daughter, named Elizabeth) shall be reputed the father of the said Elizabeth, or that she was a basbard. It was proved, that he fell sick the twenty-second day of March, and died the day following, of the plague; and that Edmund Andrews, father of the said deceased Edmund, in malice to his son's wife, had much abused her, and caused her to be dislodged from places where she was harboured; and to live in the cold streets; and that she was so used for six weeks together before her delivery; and she being brought into a woman's house who commiserated her case, having warmth and sustenance, was presently, within twenty-four hours, delivered of the said Elizabeth, and this being proved, as likewise the misusage, by five women of good credit, and two doctors of physic, and a man midwife, all on their oath declaring, that the child came in time convenient to be daughter of the deceased, and that the usual time for a woman to go with child was nine months and ten days, meaning solar months, thirty days to the month, and not lunar months; and that by reason of want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months or more, the court held here, that it might well be as the physicians had affirmed. And the physicians further declared, that a perfect birth may be at seven months, according to the strength of the mother, or of the child, which is as long before the time of the proper birth; and by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind. And so the court delivered to the jury, that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the deceased.

## C H A P. II.

*Of Legitimate Children.*

**A**LL children born in lawful wedlock are legitimate, unless the husband be out of the kingdom of England, or beyond the four seas for above nine months, so that he cannot be supposed to have had any commerce with his wife during that period; but unless this absence can be clearly proved, the law supposes access to be had by the husband. Further, if there is an apparent impossibility of procreation on the part of the husband, either on account of his tender years, as if he is only eight years old, or bodily imbecility. The law always considers the husband as having the power and dominion over his wife, and therefore may keep her within the bounds of duty. But if a person bed-ridden marries a woman that is pregnant, in his chamber, and the woman is afterwards delivered, such child will be adjudged bastard, from the apparent impossibility of the husband being the father of it. But where a woman guilty of incontinence, after her husband's death married her adulterer, and within six months had a child, it was adjudged to be the issue of the first husband, because he had the dominion of the woman at the time of her conception. If a couple be divorced *a mensa et thoro*, if the wife breeds children, they are bastards; for the law will presume the husband and wife to conform to the sentence of separation, unless access be proved. But in a voluntary separation by agreement, the law will suppose access, unless the negative be shewn<sup>2</sup>.

<sup>1</sup> 2 Roll's Abr. 353. Palm. 9.<sup>2</sup> Co. Litt. 244. See page 94.

The issue of an incestuous marriage, or by a marriage had by persons within the limited degrees of consanguinity, unless a sentence be obtained in the ecclesiastical courts, declaring such marriage null whilst the parties live, cannot be bastardized after the death of either parent, but they are deemed legitimate<sup>a</sup>.

### *A Mulier.*

**WHEN** a man hath a bastard son, and afterwards marries the mother, and has by her a legitimate son, the latter is described, in the language of the law, as a mulier, or *mulier puisnè*, which term is taken from the legal denomination given to the woman, who before marriage is called *concubina*, and after marriage *mulier*. This mulier is legitimate, whilst the eldest son is a bastard, or *bastard eignè*. If on the death of the father the bastard enters upon his land, and enjoys it to his death, and dies seized thereof, whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever) are totally barred of their right. And this as a punishment on the mulier for his negligence in not entering during the bastard's life, and evicting him. And also because the law will not suffer a man to be bastardized after his death, who entered as heir, and died seized, and so passed for legitimate in his life-time. Further, because the canon law (following the civil) allowed such *bastard eignè* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritance of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that after the land had descended to his issue, they would not unravel

<sup>a</sup> Salk. 548. See page 159.



the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for if the mother never was married to the father, such bastard could have no colourable title at all <sup>b</sup>. If a *bastard aigne*, so possessing himself of his father's estate at his death, invites the mulier, his brother, to visit him, or to hunt upon the land, this is no interruption of the possession of the bastard, because he came by his consent, so that the coming on the lands could be no trespass; but if the mulier, uninvited, comes upon the ground, and cuts down a tree, or digs the soil, or takes the profits, these are interruptions, and may amount to an entry in law. Or if the mulier puts his beasts into grounds, or directs a stranger to do so, such acts amount to an entry, without being accompanied with any verbal claim <sup>c</sup>.

*A monstrous Birth cannot inherit.*

**A** Monster which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, notwithstanding he is brought forth in marriage. But deformity in any part of the body is no bar to heirship, if it hath the human shape <sup>d</sup>. This is a very ancient rule in the law of England <sup>e</sup>: and its reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with ours in excluding such births from successions <sup>f</sup>, yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby, esteeming them the misfortune, not the fault of that parent. But our law will not admit a birth of

<sup>b</sup> Litt. sect. 399, 400. Co. Litt. 244. Blackst. b. II. c. 15. <sup>c</sup> Leon. 144.

<sup>d</sup> Co. Litt. 7, 8.

<sup>e</sup> Brañton, l. 1. c. 6.

<sup>f</sup> Ff. 1, 5, 14.

this kind to be such an issue as shall entitle the husband to be tenant by the curtesy <sup>k</sup>, because it is not capable of inheriting. And therefore if there appears no other heir than such a prodigious birth, the land shall escheat to the lord <sup>h</sup>.

*On the Settlement of Legitimate Children.*

**C**Hildren are entitled to the settlement of their father, until they have acquired another. The son of a certificate person born after the certificate, cannot gain a settlement otherwise than that certificate person himself can, therefore the son of such certificate man and woman cannot gain a settlement by service, or by any other means than by taking a lease really and bona fide of a tenement of the value of 10l. or by executing some annual office in such parish, being legally placed in such office <sup>i</sup>, for if the child be born of certificate parents in the parish to which they came by certificate, and live to the age of twenty-one years, so that he is no longer to be considered as part of his father's family, and dependant on his settlement; if he likewise has hired himself to service for a year, and completed that service, still such child has the advantage of his parents certificate, and is bound by the terms of it <sup>k</sup>.

On a special order of sessions relating to the settlement of a boy of eight years, and a girl of six, it was stated, that the mother of these children had an estate of 4l. a year at Firley, where she and her husband lived and had these children; that she dying, her husband became tenant by the curtesy, and whilst such he took 30l. a year at Hasfield, and lived one year there with his two children, and then died; that

<sup>h</sup> Co. Lit. 29.

<sup>i</sup> Blackst. b. II. c. 15.

<sup>k</sup> 9 & 10 W. III. c. 11.

<sup>l</sup> Case of Bray and Stottelbrooke, H. 19 G. II. Burrow's Set. Ca. 259.

the children being found with their grandmother at Tirley, were both removed to Hasfield, which order the sessions confirmed. And now the court upon argument, confirmed the orders as to the girl, but quashed them as to the boy. For as to the boy, he was tenant in fee of the 4l. a year; and though it was not stated that he was actually upon that spot, yet it was enough that he had such estate in the parish, from which he could not be removed. But as to the daughter it is otherwise; she could demand no maintenance out of her brother's estate, and it was never yet determined, that children go to a grandmother for nurture. She may indeed be charged to contribute to their relief in the parish where they are settled<sup>1</sup>.

A poor man built a cottage upon the waste belonging to lord Pembroke, without licence from his lordship, who, notwithstanding, never disturbed the man in his possession, and he lived in this cottage for thirty years, and by his will left three guineas in the hands of his executors to purchase this cottage of lord Pembroke. Upon his death, Elizabeth his only child, and heir at law, entered into the cottage, and after married one Barrow, and lived in the cottage, and they were in quiet possession for three quarters of a year, and then sold it.—The question was, whether the daughter and her husband Barrow, had gained a settlement by virtue of this inhabitancy, in the parish of Wyley, in which their cottage was?—It was argued, that the inhabitant was a disseisor, and had no right to build upon the waste, and was at any time removable by the lord of the waste; and if he might have been removed within forty days, his long possession gave him no title, for he must only be considered as a tenant at will, and consequently his continuance upon the

<sup>1</sup> Case of Hasfield and Tirley, T. 13 G. II. Str. 1131.

cottage, though never so long, could give him no settlement; and if the cottager had no right of settlement, none claiming under him shall be in a better condition. Further, the statute of 31 Eliz. prohibits the building of cottages, therefore the erection of one is unlawful, and shall have no privilege or encouragement; the inhabitancy here without lease, or other good title, can gain no right of settlement. These objections were answered by the court, who held it clearly to be a good settlement. And though it was further objected, that the cottager himself was sensible he had no right, by his devising money for the purchase of a term under the lord of the waste, yet it was overruled. And by all the court it was held, that when a man hath such a possession as he cannot be removed from, and hath enjoyed that possession forty days, he thereby gains a settlement; and that is the reason why a copyholder, or lessee for years, gains a settlement by an inhabitancy for forty days; for in those cases the justices of the peace cannot determine his right: this present case is very strong; for the thirty years possession of the cottager, without interruption, would have been a good title in an ejectment; and for that reason the justices of the peace cannot determine his title. It appears upon the face of the order, that the cottager had a good title in ejectment, and in any case but in a real action. Lord chief justice Raymond said, he had known recoveries upon a twenty year's quiet possession, is a title to a plaintiff in ejectment, as well as to a defendant. After so long a possession as this, it should be presumed that the cottager had a licence to erect the cottage; but this case goes further, for besides the thirty years quiet possession, and twenty years possession of the cottage, here is a descent cast upon the daughter, who was heir to the cottager, and *prima facie* it is an inheritance in the daughter, and an estate by disseisin is in law a good estate, and a fee-simple till it be defeated. Wherefore all the court held, that

that the justices had no jurisdiction in this case, for they could not examine into the title to the land. And the settlement in the parish of Wyley was adjudged to be good<sup>m</sup>.

Where the father is a foreigner, or the place of the last legal settlement of a legitimate child is not known, there the child may be sent to the place of his birth, as well as an illegitimate one. But if the mother have a settlement, the children shall be sent thither; so that the place of the birth of a legitimate child is its settlement, until another settlement is found out<sup>n</sup>.

Legitimate children being settled where the parents are settled, therefore if a father gains a second settlement after the birth of his child, such child may be sent there, though he has never been there before<sup>o</sup>.

If the father be settled in the parish of B, and goes to work in the parish of H; and before he gains any settlement there has a son born in the parish of H, and then dies, this child may be sent to the parish of B, for it is not the birth, but the settlement of the father, that makes the settlement of a legitimate child, the death of the father does not alter the settlement of the child, even if he dies before the birth of the child<sup>p</sup>.

There is no distinction between the settlement of children with the father or mother, for they are as much her's as the father's, and nature obliges her as much as the father to provide for them, and so does the law; and every argument that holds for their settlement with the father, holds as to their settlement with the mother<sup>q</sup>.

<sup>m</sup> Str. 608.

<sup>n</sup> Foley, 269. 1 Scff. Ca. 18.

<sup>o</sup> L. Raymond,

2332.

<sup>p</sup> Holt chief justice, Comb. 380.

<sup>q</sup> Parker chief justice,

Foley, 254.

But if after the death of the father the mother marries again, to an husband who is settled in another parish, her children; such of them as are above seven years old, shall not be removed; those under shall be removed, but that only for nurture, for they shall be kept at the charge of the other parish, where their father whilst living was settled; and to that parish they may be sent after seven years old, as to the place of their lawful settlement; for this accidental settlement of their mother, which was only by the marriage with a second husband, and as she is now become one person with him, shall not gain a settlement for her children.

If the father runs away, and the mother removes into another parish, and gains a settlement there, it was held by lord Hardwicke chief justice, that as it did not appear that the father was dead, the court must suppose him to be living, and in such case the children could gain no settlement but what was derived from their father<sup>r</sup>.

But where the father is a foreigner, or if an Englishman has no settlement, and runs away, the children, as well as the mother, ought to be settled where the mother was settled before marriage<sup>s</sup>. The child's settlement follows that of its father, if the father's can be found; and no recourse shall be had to the mother's settlement, till that of the father's can be traced no further<sup>t</sup>.

A travelling woman having a small sucking child upon her was apprehended for felony, and sent to gaol, and was hanged.—This child is to be sent to the place of its birth, if that can be known, otherwise it must be sent to the town where the mother was apprehended, because that town ought

<sup>r</sup> 2 Sess. Cas. 182.

<sup>s</sup> Foley, 252.

<sup>t</sup> Burrow's Set. Ca. 482.

not to have sent the child to gaol, it being no malefactor<sup>u</sup>. And Holt chief justice, where a child is first known to be, that parish must provide for it till they find another<sup>v</sup>.

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## C H A P. III.

*Of Illegitimate Children.*

**A**LL children born before matrimony are bastards by the law of this country; besides which it has been shewn in many instances, that children born in lawful wedlock, may, on many accounts, be bastardized: and posthumous children born more than forty weeks after the decease of the husband are illegitimate.—It was found by verdict, that Henry, son of Beatrice which was the wife of Robert Ridwell deceased, was born eleven days after a woman's farthest lawful time, and thereupon it was adjudged that he was not the son of Robert w. If a divorce *a vinculo matrimonii* has been obtained, all the issue born during the coverture which is thereby dissolved are bastards; for such an absolute annulling of the marriage can only take place where some cause is shewn, which made the marriage unlawful from the beginning.

The principal obligation which the law lays on the parents of bastard children is, that of maintenance, which it regulates in the following manner. A woman who declares herself with child of a bastard, or who is delivered of

<sup>u</sup> Dalr. 162.<sup>v</sup> Comb. 364, 372.

w 1 Inst. 123.

one, must make oath before a justice of peace of the man who begot the child, who is then by virtue of a warrant brought before him, when he must give good security either to maintain the child, or that he will appear at the next quarter sessions to try the fact charged upon him. In the mean time, if the woman either miscarries, or proves not to have been with child, or is married, or dies, the securities given are discharged; or the man, who for want of sufficient securities, must be committed to prison on his first appearance, on either of these events taking place is discharged. Otherwise the sessions, or justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging either the mother or the putative father, with the payment of money; or other sustentation for that purpose: and if such putative father or lewd mother run away from the parish, the overseers, by direction from two justices, may seize their rents, goods and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child, till one month after her delivery, which indulgence is very frequently a hardship upon the parish, by suffering the parents to escape. Whether the reputed father of a bastard child may take the child from the parish, and provide for it himself, hath been doubted; and seems not yet to be fully settled. If the reputed father indemnifies the parish, the intention of the act 18 Eliz. c. 3, seems to be answered, and there may be supposed something of natural affection, (especially if he acknowledges the child to be his) inclining him to be solicitous for the child's welfare; at least more than can be reasonably expected from parish officers. But then, to be allowed to take the child from its mother, with whom the parish officers usually and very properly leave it whilst very young, is unnatural and cruel; and it is very rare that  
the



the reputed father ingenuously owns himself to be the real father. But if the child is of age and ability to be an apprentice or servant, and the reputed father can find a proper master, it is fit that he should have power to put out the child accordingly; or that his contribution to the parish from that time should cease\*.—If the reputed father of a bastard child gives bond to indemnify the parish, he escapes paying any thing towards the maintenance of the child; unless the mother with her child will throw herself on the parish, which sometimes perhaps her ability will not permit, or otherwise she disdains to do. In such case it hath been advised sometimes for the woman's father to bring an action against the man for special damages sustained by the loss of his daughter's service; and a jury according to circumstances will give reasonable compensation. But in such case the daughter must be under the age of twenty-one years, and be part of her father's family at the time †,

A bastard is capable of inheriting nothing, being considered by the law as the son of nobody, nor can such be the heir to any one; but this must be understood as to civil purposes, for there is a relation as to moral purposes, therefore he cannot marry his own mother, sister, daughter, or the like‡. A bastard has no surname by inheritance, but he may gain one by reputation. But all these stigmata of bastardy may be removed, and the bastard may be legitimated, and rendered capable of inheriting, by the authority of an act of parliament, as was done in the time of Richard II. in favour of John of Gaunt's bastard children\*, and recently in favour of a natural daughter of the first earl of Orford,

\* Burn's Just. art. Bast.

† 4 Burr. R. 1878. See page 365.

‡ 3 Salk. 66. 1d Raym. 68. Comb. 356.

\* 4 Inst. 36.

Consideration of natural affection will not raise a use to a bastard. For though there is natural affection between the parent and his bastard issue, yet the raising of the use is a construction of the law, and therefore the use shall never arise<sup>b</sup>. If the issue of a man who is a bastard purchases lands, and dies without issue, though the land cannot descend to any heir on the part of the father, yet to the heir on the part of the mother, being no bastard, it may<sup>c</sup>. The prelates in the parliament of Merton, in the thirteenth century, endeavoured to procure an act to legitimate all bastards in case the parents intermarried at any time afterwards, but this was rejected by the unanimous voice of the lay-peers. The civil law differs from the common law in allowing a bastard to succeed to an inheritance, if after his birth the mother was married to the father. And further, if the father had no lawful wife or child at that time, the issue of a concubine might inherit, although she was never married to the father. In case of intestacy and want of lineal heirs, she and her bastard son were admitted each to one-twelfth of the inheritance<sup>d</sup>. And a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married. Which distinction was grounded on the certainty which there was respecting the mother, although the actual father was uncertain<sup>e</sup>.

A child may be bastardized by the solemn confession of the mother. As was the case of Richard Savage in 1697, whose mother, Ann countess of Macclesfield, having lived for some time on very uneasy terms with her husband, thought a public confession of adultery the most obvious and expeditious method of obtaining her liberty; and therefore declared, that the child with which she was then great, was

<sup>b</sup> Jenk. 47. Dyer, 374.

<sup>c</sup> Noy, 159.

<sup>d</sup> Nov. 89. c. 8.

<sup>e</sup> Cod. 6. 57. 5.

begotten

begotten by the earl Rivers. Her husband, as may be easily imagined, being thus made no less desirous of a separation than herself, prosecuted his design in the most effectual manner; for he applied, not to the ecclesiastical courts for a divorce, but to the parliament for an act, by which his marriage might be dissolved, and the child with which his wife was then great illegitimated. During the session in which this bill was depending, the countess was delivered of a son, 10th of January, 1697-8, and on the third of March following the divorce bill was passed, and his wife's fortune, which was very considerable, was repaid her, and she in a short time married colonel Brett<sup>f</sup>. It seems that the lords were not unanimous in their opinion of this proceeding, for the following protest is entered on their journals against this bill. “*Dissentient*—Because we conceive that  
 “ this is the first bill of that nature that hath passed, where  
 “ there was not a divorce first obtained in the spiritual court,  
 “ which we look upon as an ill precedent, and may be of  
 “ dangerous consequence in the future. *Halifax. Rochester.*” And Salmon in his review of those times observes, “ this year was made remarkable by the dissolution of a marriage solemnized in the face of the church.” But after times have established this mode of proceeding, by obtaining a bill to annul a marriage without the intervention of the ecclesiastical courts: but it is always in that case founded on a verdict obtained in the temporal courts. So that it should seem that at this day the proceedings of parliament to annul a marriage without any verdict obtained in any court below, is supported by this instance singly and alone.—And in the last term, (Easter 1777) in the King's Bench upon a rule to shew cause against a new trial, the question was, whether the evidence of the mother was admissible to bastardise

<sup>f</sup> Johnson's Life of Savage, page 3, 4.

her issue.—A gentleman and his wife lived together several years, and had several children. The husband died, and his eldest son entered on the hereditary estate, which he held until the second son brought a writ of ejectment, alleging that he was not born in wedlock. The cause was tried before Mr. Baron Eyre, and the plaintiff declared that the defendant was born one month and one day before the ceremony was performed, which declaration he attempted to support by the testimony of the mother, who was cited to attend the trial. The defendant pleaded generally, and his council objected to the admissibility of the mother's evidence, (with which the judge concurred) a verdict was obtained for the defendant. In arguing this question, the council for the defendant strongly insisted on the inadmissibility of the mother's proving the bastardy of her own child: an evidence which they presumed would be contrary to nature, to law, and to decency. In reply to which, and in support of the rule it was said, that the objections to the mother's evidence applied to children that were born *in* wedlock, and not to such as were born *before* marriage. Lord Mansfield allowed that by the civil, the canon, and the common law, the parole evidence of a parent was inadmissible to affect a child born *in wedlock*; he observed upon the several reasons which made such evidence dangerous, particularly partiality, caprice, or fixed aversion, which might induce bad women to bring a charge impossible to be refuted, by which a rightful heir might be deprived of his inheritance. His lordship also mentioned the indecency and illegality of permitting a woman to prove herself an adulteress, and therefore subject herself to penalties. But his lordship concluded with denying the doctrine of Mr. Baron Eyre, and allowed the admissibility of the mother's evidence to prove bastardy before marriage, and ordered the rule to be made absolute.—If a bastard dies intestate, without wife or issue, the king is entitled to the personalty,

personalty, and the ordinary of course grants administration to the patentee or grantee of the crown<sup>s</sup>.—Upon an issue out of Chancery, to try whether the plaintiff Pendrell was the heir at law of one Thomas Pendrell, it was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in London, and he going into Staffordshire. That at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in London within the last year it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed by the court and counsel at the trial at Guildhall, before lord chief justice Raymond, that the old doctrine of being within the four seas was not to take place; but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff, and the court of Chancery acquiesced in the verdict<sup>h</sup>.—A feme-covert, during the absence of her husband at Cadiz, was brought to bed of a bastard, and her husband was not in England from the time of her conception till she was brought to bed. The question was whether this child was a bastard, especially within the words of the statute of the 18th of Elizabeth, which says, *children begotten and born out of lawful matrimony*. Which cannot be said of this case, the mother being married at the time of the birth of the child; and if such a mother should kill such a child, she could not be guilty of murder within the statute, 21 Jac. c. 27. But the court. He is a bastard who is begotten and born of a feme-covert, whilst the husband is beyond the four seas. And in a real action if general bastardy was pleaded, the bishop ought to certify such an one a bastard. And

<sup>s</sup> 3 P. W. 33.  
Straf. 925.

<sup>h</sup> Case of Pendrell and Pendrell, H. 5 Geo. II.

where a man is a bastard, he is such to all purposes, and why not within the 18th of Eliz. for though the statute 21 Ja. is a penal law, yet the act of 18 Eliz. is a remedial law<sup>i</sup>. But this non-access of the husband ought to be proved otherwise than upon the wife's oath, as in the following case.—The defendant Reading was adjudged, by an order of bastardy, to be the putative father of a bastard child, begotten of the wife of one Almont of Sherborne. The said woman on the appeal gave evidence, that the said Reading had carnal knowledge of her body in or about August 1732, and several times since; and that her husband had no access to her from May 1731, to the time of her examination in that court, being the 3d of October 1773, and that the said Reading was the father of the said child. And the question on removal of the same into the King's Bench was, whether the wife in this case should be admitted as an evidence for or against her husband, and to bastardize her own child. And the whole court were of opinion, that the wife could be a witness to no other fact than that of incontinency; and that this she must be admitted to from the necessity of the thing, but not to the absence of her husband, which might properly be proved by other witnesses. And likened it to the case of hue-and-cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, because that may be proved by others<sup>k</sup>.—But in ejectment, the question on a trial at bar was, whether the lessor was son and heir of Cabel Lomax, Esq; deceased, which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at London, where the mother lived, so that access must be presumed; the defendants were ad-

<sup>i</sup> The King against Abberton, M. 10 W. III. Ld Raym. 395.

<sup>k</sup> The King against Reading, M. 8 Geo. II. 5 Sess. Ca. 175.

mitted to give evidence of his inability from his bad habit of body. But their evidence not going to an impossibility, but an improbability only, that was not thought sufficient, and there was a verdict for the plaintiff<sup>1</sup>.

If a man marry his kinswoman within the degrees, the issue between them is not bastard until divorce found; for the marriage was not void but only voidable<sup>m</sup>.

Bastardy is distinguished into general and special. General bastardy is founded on the plea, that the parents of the bastard were not accoupled in lawful matrimony; or that the marriage was null and void on account of consanguinity, or some other impediment. Special bastardy is founded on the persons being born before espousals. General bastardy is triable only by the certificate of the bishop in the courts Christian; but special bastardy is triable by a jury at common law<sup>n</sup>. The question of bastardy, or legitimacy, ought first to be moved in the king's temporal court, and thereon issue out to be joined there; and then it ought to be transmitted by the king's writ to the ecclesiastical court, to be there examined and tried<sup>o</sup>. And if without such writ being transmitted, the ecclesiastical court enters on examination of such suit, a prohibition lays, as such suit cannot be determined there without affecting the temporal interest of the subject.

If a bastard has gotten a name by reputation, he may purchase by it<sup>p</sup>. If a remainder be limited to I. S. son of W. S. although he be a mere bastard, and no mulier, by the spiritual law, yet if he be reputed for his son, it is a good

<sup>1</sup> Case of Lomax and Holmden, M. 6 G. II. Str. 940.  
<sup>n</sup> Abr. 357.    <sup>o</sup> Hughs. c. 29. John. 264. God. 489.  
<sup>p</sup> Co. Litt. 36.

<sup>m</sup> 4 Roll's  
<sup>e</sup> 4 Inst. 243.

remainder. But if an estate for life be made, the remainder to the issue of the body of I. S. or by him begotten on the body of A. S. if he hath afterwards illegitimate children, yet these children shall never take this remainder, because he cannot have the reputation of issue before their birth<sup>4</sup>. By a devise of all his goods to his children, a bastard cigne shall take a portion<sup>5</sup>. G. S. conveyed lands to the use of himself, remainder to G. S. his son; whereas in truth, G. S. was born of one B. in matrimony of one C. yet was reputed the son of G. S. and educated by him; though the boy was but six years old, it was ruled he should take the remainder, for having gotten by reputation the name of G. S. these words are a certain description of the person to take the remainder<sup>6</sup>.—But if a remainder be limited to the eldest issue of A. whether legitimate or illegitimate, and A. has issue a bastard, he shall not take this remainder; for it is not vested in A. as it was in the former case, but is in contingency, and the certain time is not defined when this contingency shall happen; for the bastard at his birth does not acquire the reputation of being the issue of A. and since the bastard when first in being cannot take by virtue of this limitation, he can never take it, for he cannot be understood to be the person designed and marked out by these words. If after his birth it depends on the uncertainty of popular reputation, whether he shall take the remainder or not; and such a designation of the person as contains no certainty in itself; or no relation to any other certain matter that may reduce it to certainty, is a void limitation<sup>7</sup>.—A limitation of a remainder to a bastard before his birth is not good; for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency<sup>8</sup>.

<sup>4</sup> 1 Inst. 3. Baron & Feme.  
Lit. 3.

<sup>7</sup> 2 Roll's Abr. 42, &c.

<sup>5</sup> Moorf. 10 Bar. & F.

<sup>8</sup> Cro. Eliz. 599.

<sup>6</sup> Co.



*Calling a Clergyman a Bastard.*

**I**F a man calls a clergyman a bastard, no action will lay; for it is necessary that the plaintiff should aver some damage; which in the language of the law is, laying his action *per quod*. But if the clergyman can shew some special loss by it, he may bring his action, for saying he was a bastard, *per quod* he lost the presentation to such a living.— A bastard strictly was incapable of holy orders<sup>v</sup>, and though that was dispensed with, yet he was utterly disqualified from holding any dignity in the church<sup>w</sup>.

*Settlement of bastard Children.*

**T**HE settlement of a bastard is in the parish where he was born; not in that of his father, as in the case of legitimate children. However, in case of fraud, as if a woman be sent either by an order of justices, or comes to beg as a vagrant to a parish which she does not belong to, and drops her bastard there, the bastard shall in the first case be settled in the parish from whence she was illegally removed: or in the latter case; in the mother's own parish, if the mother be apprehended for her vagrancy. Where a bastard is born in a parish where the mother hath no settlement, the child shall go with its mother for nurture, whilst it is a nurse child, to her place of settlement, and the parish where it was born shall not be liable to maintain it until the child shall be lawfully removed thither as to its place of settlement<sup>x</sup>; but if the mother deserts such bastard child, it shall be settled in the parish where born.

<sup>v</sup> 4 Rep. 17. 1 Lev. 248.<sup>w</sup> Fortes. c. 40. 2 Roll's Abr. 356.<sup>3</sup> Rich. II. c. 3. <sup>7</sup> Rich. II. c. 12.<sup>x</sup> Burn's J. Act. Bast. <sup>3</sup> Rep. 58.

But after the age of seven years, a bastard child is *prima facie*, settled where born. But if a woman comes into a parish by privity and collusion of the officers where she belongs, and is there delivered, such bastard is not entitled to a settlement in that parish in such a case<sup>y</sup>. Likewise a bastard born whilst the mother, under an order of removal, is on the road, is not settled where born, but where the order of removal had destined it to be<sup>z</sup>. But an illegal order of removal will not settle a bastard child<sup>a</sup>.

Any woman wandering and begging that shall be delivered of a bastard child in any parish or place to which she doth not belong, the child shall not be settled where born, but the settlement of the woman shall be the settlement of the child<sup>b</sup>. A child born in the house of correction, or in the county gaol, or in a lying-in hospital, shall be sent to the place of its mother's settlement<sup>c</sup>.

Ann Causier came into the parish of Ipsley, with a certificate from Studley, in the words following: “ To the  
 “ churchwardens and overseers of the poor of the parish of  
 “ Ipsley. We the churchwardens and overseers of the parish  
 “ of Studley, do hereby certify, own, and acknowledge,  
 “ Ann Causier, spinster, and the child or children that she  
 “ now goeth with, to be our inhabitants, legally settled with  
 “ us in our said parish of Studley; and if at any time here-  
 “ after the said Ann Causier, or her child or children which  
 “ she now goeth with, shall become chargeable to and ask  
 “ relief of your said parish of Ipsley; we the said church-  
 “ wardens and overseers of the poor of our said parish of  
 “ Studley, do hereby promise for ourselves and successors,

<sup>y</sup> Stat. Ca. 66.

<sup>z</sup> Ibid.

<sup>a</sup> 1 Salk. 121. <sup>2</sup> Idem. 535.

<sup>b</sup> 17 Geo. II. c. 5. s. 25.

<sup>c</sup> 2 Bullst. 358.

“ that we will, when requested by any of you, receive, relieve, and provide for them, as our inhabitants, according as the law in that case requires.” The child was born at Ipsley, within about a month after she came to reside there under the certificate. It was argued, that the certificate could not in this case operate as to the unborn child, but that the child was, notwithstanding, settled in the place where it was born. That this is not a certificate within the act of 8 & 9 W. c 30, the undertaking relates to an embryo, a non-entity. An unborn child cannot be personally certificated, it is no part of the parents family, and the act obliges only the certifying parish to provide for the pauper mentioned in the certificate, together with *his or her family*; and a bastard in the sense of the act is part of no person’s family. But the court were clearly of opinion, that the parish of Studley was bound by this certificate, which takes notice of the woman being then unmarried, and with child, and acknowledges the child she then went with to be legally settled with them in their parish. And lord Mansfield observed, that the woman was very big with child, and was understood by both parishes to be so; and Studley expressly promised to provide for the infant she then went with. Therefore they ought to be bound by their certificate. An infant *in ventre sa mere*, may be to a variety of purposes considered as born <sup>d</sup>.

<sup>d</sup> Case of Ipsley and Studley, M. 10 Geo. III. Burrow’s Set. Ca. 650.

## C H A P. IV.

*Of Guardian and Ward.*

**I**T has been already observed, that the father is naturally the guardian of his own child ; and the mother becomes so in some cases ; for with regard to daughters, the father has a power to assign by deed, or will a guardian to any woman child under the age of sixteen years ; and if none be so assigned, the mother shall in this case be guardian <sup>c</sup>. Of guardians there are three kinds : (1.) Guardians for nurture. (2.) Guardians in soccage ; or, guardians by the common law. (3). Guardians by statute ; or, testamentary guardians <sup>d</sup>. Guardians for nurture are the father or mother of course, till the infant attains the age of fourteen years ; and in default of father or mother, the ordinary appoints some one to take care of the infant's personal estate, and to provide for its maintenance and education.—Guardians in soccage are appointed when the infant is entitled to some estate in lands ; and this guardianship by the common laws devolves on his next of kin, to whom the inheritance cannot possibly descend <sup>e</sup>. As, where the estate descended from his father, in this case his uncle by the mother's side, cannot possibly inherit this estate, and he shall be the guardian. The law carefully removing from the guardian any temptation from private interest, which might influence him to betray his trust ; and therefore will not suffer the person of an infant to be placed under his care, who may possibly become heir to him.—These guardianships in nurture and soccage,

<sup>c</sup> 4 & 5 P. & M. c. 8.<sup>d</sup> Co. Litt. 81.<sup>e</sup> Lib. 123.

continue no longer than till the infant is fourteen years of age; he being then considered by the law as of sufficient discretion to choose his own guardian, which he has a right to do, unless the father has already named one<sup>b</sup>. Formerly this right was claimed by the lord of the heriot, on the death of the father. Guardians by statute are such as are so appointed by the father; and a father under age may dispose of the custody of his child; and such disposition draws after it the lands as incidental to the custody<sup>c</sup>. Besides which, the city of London by custom, and some other places likewise, appoint special guardians<sup>k</sup>.—The power of a guardian, so long as his authority continues, is the same as that of a father; and the guardian, when his ward comes of age, is bound to give him an account of all that he has transacted on his behalf; and must answer for all losses that have happened through his wilful default or neglect. In order therefore to prevent disagreeable contests, it has become a practice with many guardians, especially where large estates are in question, to indemnify themselves by applying to the court of Chancery, acting under its direction, and accounting annually before the officers of that court. The king, as the father of his country, is the universal guardian of all infants, idiots, and lunatics, who cannot take care of themselves; therefore the lord Chancellor, as the king's delegate, hath jurisdiction in appointing and removing guardians, and in superintending the interests of minors. In case therefore any guardian abuses his trust, the court will check and punish him; nay, sometimes proceed to remove him, and appoint another in his stead<sup>l</sup>. And from all proceedings relative thereto, an appeal lays to the house of lords.—The court of Exchequer can only appoint a guardian *ad litem*, to

<sup>b</sup> 12 Car. II. c. 24.<sup>l</sup> Vaugh. 178.<sup>k</sup> Co. Litt. 88.<sup>l</sup> Salk. 44. 625. Blackst. b. I. c. 17.

manage the defence of the infant, if a suit be commenced against him. A power which is incident to the jurisdiction of every court of justice. But when the interest of a minor comes before the court judicially in the progress of a cause; or upon a bill for that purpose filed, either tribunal indiscriminately, will take care of the property of the infant. According to the ancient hereditary feudal establishment, every heir not of full age, namely, a male under the age of twenty-one years, and a female under fourteen, were the wards of the lord of the fief, which lord was styled their guardian in chivalry. He had the custody of the body and lands of such heir, unaccountable to any one for the produce of the latter, until the heir attained to full age. The female was supposed marriageable at fourteen years of age; and that her husband was capable of performing the service which the lord was entitled to call upon him for. A further advantage was allowed the lord by statute<sup>m</sup>, which gave him the right of a guardian in chivalry over a female, until she attained the age of sixteen years, provided her ancestor died before she had completed her fourteenth year. But in earlier times, in order to accommodate the Norman government more to Saxon customs, the charter of Henry I. took this custody from the lord, and placed it in the widow and next of kin; and this as to the land as well as the children. But so noble an immunity was not long enjoyed. When the female heir to an hereditary feud arrived at the age of sixteen years, she comes entitled to sue out her livery, or *ouster lemain*; and upon paying half a year's profit upon the lands, she obtains the delivery of her lands out of her guardian's hands; but a learned commentator is of opinion, that this payment was expressly contrary to Magna Charta<sup>n</sup>. The lord was entrusted with such discretionary power over

<sup>m</sup> West. I. 3 E. I. c. 22.

<sup>n</sup> Blackst. b. II. c. 5.

his vassal, because the spirit of those times considered the connection between the lord and the vassal, as a close and friendly one; and he who was to receive the future services of the vassal, was deemed the most likely person to give him or her a suitable education; but the most dangerous power which the lord possessed over his minor vassal was in respect of marriage. He might choose for his ward a suitable match; it was required to be without disparagement or inequality; which if the infants refused, they forfeited the value of the marriage to their guardian; but this value was settled by a jury, and depended on the sum any one would give to obtain such a marriage. On the other hand, if the infants married without the consent of their guardian, they forfeited double the value acquired by such marriage. The power thus given to guardians in chivalry over their wards, was very arbitrarily and oppressively exercised; insomuch, that it was found necessary to regulate it by the great charter ratified by king John, which obliged the guardian to acquaint the next of kin with the contract, previous to its accomplishment; and it expressly enjoins them to marry their wards without disparagement. But in the charter confirmed in the next reign, this clause respecting relations is omitted; and the evil continued as grievous as before; guardians having an unlimited power of making what advantages they thought fit of their female wards, by selling them in marriage; and such were the arbitrary and irrational sentiments of legislators in those times, that by an express statute, such right of selling his ward in marriage; or receiving the price or value of it, is confirmed to the guardian<sup>o</sup>. These oppressive and ruinous claims made by the lord on his vassal, is thus described by a very able writer: "The heir, on the death of his ancestor," says he, "if of full age, was plun-

<sup>o</sup> Stat. Merton, l. 2. c. 38. sect. 1.

dered of the first emoluments arising from his inheritance, by way of relief, or primer seisin; and if under age, of the whole of his estate during infancy; a female standing in exactly the same predicament; and then, as Sir Thomas Smith very feelingly complains<sup>p</sup>, when he came to his own after he was out of wardship; his woods decayed; houses fallen down; stock wasted and gone; lands let forth and ploughed to be barren; to make amends, he was yet to pay half a year's profits as a fine for suing out his livery; and also the price and value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this the untimely and expensive honour of knighthood, to make his poverty more completely splendid; and when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed, without paying an exorbitant fine for a license of alienation<sup>q</sup>. A right thus established, although repugnant to every idea of natural justice, continued in full force until the year 1660, when all these oppressive appendages to feudal tenure were at once effaced. It was then enacted<sup>r</sup>, that *the court of wards and liveries, and all wardships, liveries, primer seisins, and ouster lemaines, values and forfeitures of marriages, by reason of any tenure by the king or others, be totally taken away; and that all fines for alienations, tenures by homage, knights service and escuage; and also aids for marrying the daughter, or knighting the son; and all tenures of the king in capite, be likewise taken away. And that all sorts of tenures held of the king or others; or turned into free or common soccage, save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand sargeantry.* This statute,

<sup>p</sup> Commonw. l. 3. c. 5.<sup>q</sup> Blackst. b. II. c. 5.<sup>r</sup> 12 Car. II. c. 24.



says the able writer above quoted, was a greater acquisition to the civil property of this kingdom, than even Magna Charta itself; since that only pruned the luxuriances, that had grown out of military tenures, and thereby preserved the tenures themselves in vigour; but this extirpated the whole, and demolished both root and branch. An heir to a socage tenure was not subject to the wardship of his lord, on which account he was liable to pay to the lord a relief, in the same manner as if of full age. But tenures in socage are subject to wardship, in case the heir be a minor, though of a very different nature from those above described, and which were incidental to knight-service. For if the inheritance descended to an infant under fourteen years of age, the wardship of him should not belong to the lord of the fee, because in this tenure no military or personal service being required, there is no occasion for the lord to take the profits in order to provide a proper substitute for his infant tenant; but his nearest relation to whom the inheritance cannot descend, shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen years. At fourteen years of age this wardship in socage ceases, and the heir may oust the guardian; and call him to account for the rent and profits; for at that age the law supposes him capable of choosing a guardian for himself\*. It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones; but as the wardship ceased at fourteen years old, there was this disadvantage attending it; that young heirs being left at so tender an age to choose their own guardians till twenty-one years old, they might make an improvident choice; therefore, when almost all the lands

\* Litt. sect. 123. Co. Litt. 89.

in the kingdom were turned into soccage tenures by the salutary statute abovementioned, it was enacted, that it should be in the power of any father by will to appoint a guardian till his child should attain the age of twenty-one years. And if no such appointment be made, the court of Chancery will frequently interpose to prevent an infant heir from improvidently exposing himself to ruin<sup>t</sup>. The doctrine of marriage in soccage tenure, was likewise diametrically opposite to those in knight's service; for if a guardian in soccage gave his ward in marriage, under the age of fourteen, he was bound to account to his ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage; for the law in favour of infants is always jealous of guardians, and therefore in this case it made them account not only for what they did receive, but also for what they might receive, on the infant's behalf, lest by some collusion the guardian should have received the value and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the act for preventing clandestine marriages, 26 Geo. II. <sup>u</sup>

A guardian is one appointed by the wisdom and policy of the law, to take care of a person and his affairs, who by reason of his imbecility and want of understanding is incapable of acting for his own interest; and it seems that by our law his office originally was, to instruct the ward in the arts of war; as also in those of husbandry and tillage, that when he came of age he might be the better able to perform those services to his lord whereby he held his lands<sup>v</sup>. The relation in which a guardian stands to his ward, bears so close

<sup>t</sup> Blackst. b. II. c. 6.

<sup>u</sup> See page 36.

<sup>v</sup> 2 Bac. Abr. 672.

a resemblance to that of a father to his child, that the same remedy which the law allows the father in a case of abduction, may be had by a guardian when his ward is stolen or ravished away from him. In the feudal times guardian in socage was entitled at common law to a writ of right *de custodia terræ et hæredis*, in order to recover the possession and custody of the infant. So it should seem that he has still a right to sue out this ancient writ. But as the court of Chancery is invested by the king with the power of superintending all the infants in the kingdom, and is the supreme guardian, the method of late pursued in all complaints relative to wards and guardians, has been by an application to the court of Chancery, as the most speedy and summary method of redress. And it is expressly provided <sup>w</sup>, that testamentary guardians may maintain an action of ravishment for trespass, for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infant <sup>x</sup>. If a woman have issue a son by a former husband, and she marries a second husband seised of socage lands, by whom she has issue another son; and the husband and wife die, leaving the said son under fourteen years of age, his brother by the half blood, if of the age of twenty-one years, shall be guardian in socage, as next of kin to whom the estate cannot descend <sup>y</sup>.—A guardian to an infant, having a considerable sum of money in his hands that was raised out of the infant's estate, laid out, with the consent of the grandmother, 3000*l.* in a purchase of lands which lay contiguous to the infant's estate, and took the purchase in his name, for his benefit, if when he came of age he should agree thereto, and allow that money on account. The infant dying in his minority, it was held by the lord chancellor against the opinion of the master of the rolls, that though neither the heir

<sup>w</sup> 12 Car. II. c. 24.

<sup>x</sup> 2 P. W. 108. Blackst. b. III. c. 8.

<sup>y</sup> Cro. Eliz. 825.

nor administrator of the infant were entitled to the lands, yet the guardian must account for the 3000*l.* to the administrators of the infant, and that it was not in the power of the guardian, without the direction of the court of Chancery, to turn the personal into real estate, by which it will descend to the heir<sup>a</sup>.—A mother, as guardian to her infant son, had out of his personal estate paid off a mortgage. The infant afterwards died, and the estate descended to a remote heir; and then the mother would have had back the money, but the court denied her any relief<sup>a</sup>.—An estate having descended to an infant subject to incumbrances, and the question being whether a guardian might, without the direction of a court of equity, apply the profits to discharge the incumbrances, or the interest of them, or whether they should not be accounted personal estate, and so the administrator of the infant be entitled to them, if the infant died in his minority; it was held by the court, that a guardian, without any direction, may pay the interest of any real incumbrance, and the principal of a mortgage, because that is a direct and immediate charge on the land, but not any other real incumbrance<sup>b</sup>.—A widow who was guardian to her son, received the rents and profits of his estate, and paid off debts by specialty, but took assignments of the bonds. The son dying in his minority, she brought her bill against the heir for a discovery of assets by descent to the satisfying of money due by bond, she claiming the profits as administratrix to her son. And it was held by the court, that the guardian was not compellable to apply the profits of the estate of the infant heir to pay off the bond debts<sup>c</sup>.—If a guardian takes a bond for arrears of rent, he thereby makes it his own debt, and shall be charged with it<sup>d</sup>.—If a guardian to an infant,

<sup>a</sup> Case of the earl of Winchelsea and Norcliffe, 1 Vern. 403.    <sup>a</sup> 2 Vern. 193.

<sup>b</sup> Case of Palmer and Danby, Ab. Eq. 261, 262.

<sup>c</sup> Case of Waters and

Ebral, 2 Vern. 606.

<sup>d</sup> 2 Chan. Rep. 97.

whose lands are incumbered to the value of 600*l.* buys it off with 100*l.* of the infant's money, he shall not charge the infant with the 600*l.* <sup>e</sup>—If a man receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him, yet he shall account for the profits throughout, and not during the infancy only <sup>f</sup>.—A receiver to the guardian of an infant, who has had his account allowed by the guardian, shall not be obliged to account over again to the infant when he comes of age <sup>g</sup>.—If a feme-guardian in foccage marriage, the husband becomes the guardian in right of his wife. But if she dies, the guardianship ceases as to him, and shall go to the next of kin to the infant, to whom the estate cannot possibly descend <sup>h</sup>.—If a guardian in foccage makes leases for years to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him if he thinks fit : for they were not derived barely out of the interest of the guardian, or to be measured thereby, but took effect also by virtue of his authority, which for the time was general and absolute, and therefore all lawful acts done during the continuance of that authority are good, and may subsist after the authority itself by which they were done is determined. And consequently the infant when he comes of age may, by acceptance of rent or other act, if he thinks fit, make such leases good and unavoidable <sup>i</sup>.—If a woman who is guardian in foccage to her son marries again, and her husband and she join in a lease of the infant's lands, this lease, upon the death of the husband, becomes void ; for the interest she had in the lands was in right of the infant, and therefore shall not bind her as those acts shall in which she joins with her husband in parting with her own possessions <sup>k</sup>.

<sup>e</sup> Idem, 243.<sup>f</sup> Ab. E. Ca. 280.<sup>g</sup> Pr. Ch. 535.<sup>h</sup> Plow.

294.

<sup>i</sup> Bro. tit. Guard. 70.<sup>k</sup> Plow. 293.

## C H A P. V.

*Of Infants, or Minors.*

**T**HE privilege of infancy does not extend to the king : for the wisdom of government has thought it necessary that he who is to preside over and govern the whole kingdom, should never be considered as a minor, incapable of governing himself, and his own affairs. Therefore if the king within age make any lease or grant, he is bound, and cannot avoid them either during his minority, or when he comes of full age. So if a king consents to an act of parliament during his minority, yet he cannot after avoid this act ; for as king he is a body politic, and cannot be a minor<sup>1</sup>. —By an infant, or minor, is meant any one who is under the age of twenty-one years, whether males or females : although a male at twelve years old may take the oath of allegiance ; at fourteen is at years of discretion, and therefore may consent or disagree to marriage ; may choose his guardian ; and if his discretion be actually proved, may make a will, and dispose of his personal estate ; at seventeen years old he may be an executor, and at twenty-one is at his own disposal, and may alien his lands, goods, and chattels<sup>m</sup>. A female at seven years of age may be betrothed or given in marriage ; at nine is entitled to dower ; at twelve is at years of maturity, and therefore may consent or disagree to marriage ; and if proved to have sufficient discretion, may bequeath her personal estate ; at fourteen is at years of legal

<sup>1</sup> Co. Lit. 43. Dyer, 209. Plow. 213. Roll's Ab. 728. <sup>m</sup> 1 Inst. 2.

discretion,

discretion, and may choose a guardian ; at seventeen may be executrix ; and at twenty-one may dispose of herself and her lands. If a female infant who is in ward marries, at common law the guardianship determines, because the husband, immediately on her marriage, becomes her guardian, and it would be inconsistent that she should at the same time be under the power of another guardian<sup>n</sup>. And here it will probably be a matter of curious speculation to the reader to see the different laws respecting women in these particulars in the most considerable ancient and modern states.—Among the ancient Greeks and Romans women were never looked upon as of age, but were subject to perpetual guardianship unless they married. But in process of time this perpetual wardship during celibacy wore away, and females as well as males were deemed of full age at twenty-five years<sup>o</sup>. Scotland agrees with England in making twenty-one years the full age in males and females. In Naples they are at full age at eighteen ; in France, with regard to marriage, not till thirty ; and in Holland at twenty-five<sup>p</sup>. An infant has been adjudged of age the day before his birth-day, for the law will not make a fraction of a day ; and therefore where a person was born the 3d of September, and the 2d of September twenty-one years he made his will. It was held good, and that he was then of age to devise his lands. And it was held that such will shall take effect, though the devisor dies before six o'clock the evening of that day<sup>q</sup>.

Infants were not permitted to inherit to a genuine feud ; but when the military service, which at first constituted the essential part of the feudal system wore away, a new kind of tenure was created, which was called an improper feud, one

<sup>n</sup> 2 Inst. 260.

<sup>o</sup> Potter's Antiq. b. IV. c. 11.

<sup>p</sup> Blackst.

b. I. c. 17.

<sup>q</sup> Ld Raym. 480.

leading feature of which was that it might descend indifferently to males or females, to adults or minors.

*An Infant in ventre sa mere.*

**W**HETHER a devise of lands to an unborn infant *in ventre sa mere* is good, has been much doubted, because the infant is not in being to take at the death of the devisor, and the freehold cannot be put in abeyance by the act of the party. But others hold that such devise is good, though the infant be not *in esse* at the death of the devisor, and that the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time. And if land be devised for life, remainder to a posthumous child, this is a good contingent remainder<sup>r</sup>. It may have a surrender of a copyhold estate made to it; it may have a guardian assigned it.

*Legal Restraints laid on Infants.*

**T**HE restraints that are laid upon infants by the laws of England are no other than such as a kind parent would subject a child to whom he tenderly loved, to prevent his committing such acts of indiscretion as an infantile judgment and want of experience might lead him to, the consequences of which might be fatal to him through his whole life; an infant therefore is not allowed by law to alien his lands, or do any legal act. He cannot execute a deed, or any kind of contract. He cannot be sued, but under the protection, and joining the name of his guardian: for by him he is to be defended against all attacks. But he may sue either by his guardian, or *prochein amy*, his next friend, who is not his

<sup>r</sup> Bro. tit. Devise, 32. 1 Salk. 231. 1 Sid. 153. Carth. 309.



guardian. This *prochein amy* may be any person who will undertake the infant's cause ; and it frequently happens that an infant by his *prochein amy* institutes a suit in equity against his guardian who abuses his trust. An infant cannot lose any property to which he is heir by non-claim, or neglect of demanding his right, they being exempt from the force and effect of a fine levied on lands, to which they are heirs, which bars the right of others by non-claim ; but they are allowed five years after their attaining full age to put in their claim<sup>s</sup> : nor is he chargeable with any kind of *laches*, or neglect, except in some very particular cases. And although infants cannot alien their estates, yet infant trustees or mortgagees are enabled to convey, under the direction of the court of Chancery or Exchequer, the estates they hold in trust or mortgage, to such person as the court shall appoint. An infant too that has an advowson may present to the benefice when it becomes void, it being in this case necessary that the general rule shall be dispensed with. It permits therefore an infant to present a clerk, who if unfit may be rejected by the bishop, rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop<sup>t</sup>. The lord chancellor King expressed himself very strongly on this point, in the case of Atkinson and Coverly, in the court of Chancery 1732, saying, that if the infant were but a year old, or younger, they ought to put a pen into his hand, and guide it to sign the presentation<sup>u</sup>.—An infant may purchase lands, but his purchase is incomplete ; for when he comes to age he may either agree or disagree to it, as he thinks best ; and the same alternative is the right of his heirs after him, if he dies before the completion of the agreement. And although he can make no deed that is not afterwards

<sup>s</sup> 4 Hen. VII. c. 24.<sup>t</sup> 3 Inst. 156.<sup>u</sup> Watf. c. 13.

voidable, yet he may bind himself apprentice by deed indentured, or by indentures for seven years ; and all obligations to pay for his necessary meat, drink, apparel, phyfic, and such other necessaries ; and likewise for his good teaching and instruction, whereby he may profit himself afterwards <sup>v</sup>. If an infant comes to a stranger who instructs him in learning, and boards him, this is an implied contract in law, that the party shall be paid as much as his boarding and teaching are worth. But if the infant at the time of his going thither was under the age of discretion, or if he was placed there upon a special agreement with some of the child's friends, the party that boards him has no remedy against the infant, but must resort to them with whom he agreed for the infant's board <sup>w</sup>. If an infant binds himself in an obligation, or other writing, with a penalty for the payment of any necessaries, that obligation shall not bind him <sup>x</sup>. Though he may buy necessaries, he cannot borrow money to buy them, for he may misapply the money, and therefore the law will not trust him but at the peril of the lender, who must lay it out for him, or see it laid out. And it shall be only for necessaries, not for matters of luxury or extravagance. And if after he becomes of age he is prevailed on by surprize, or other undue means, to give security, yet a court of equity, in consideration of circumstances, will relieve <sup>y</sup>. If the party to whom a minor becomes indebted for necessaries, takes bond of him for the same, this shall not extinguish the simple contract, for the bond has no force <sup>z</sup>. When an infant binds himself to pay for necessaries, it must appear to the satisfaction of a jury that the things bought were actually necessaries, and of reasonable prices, and suitable to the infant's degree and estate. And the jury may separate what things are really necessaries, from such as they consider not

<sup>v</sup> Co. Litt. 135. 2. 172. Blackst. b. I. c. 17.

<sup>w</sup> Allen, 94.

<sup>x</sup> 1 Inst. 172.

<sup>y</sup> Salk. 387. 2 Ark. 35.

<sup>z</sup> Cro. Eliz. 920.

to be so; and likewise their intrinsic value, and proportion their damages accordingly.\*.

In criminal cases an infant of the age of fourteen may be capitally punished for any capital offence, but under the age of seven he cannot. The period between seven and fourteen is subject to much uncertainty. For the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could discern between good and evil, at the time of the offence committed, he may be convicted, and receive judgment and execution of death, though he hath not attained to years of puberty or discretion. A remarkable instance of this kind we have in the case of William York, a boy of ten years of age, who was convicted at Bury summer assizes in 1748, before lord chief justice Willes, for the murder of a girl about five years of age, and received sentence of death. But the chief justice, out of regard to the tender years of the prisoner, respited execution, till he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case, which he reported to the judges as follows. The boy and girl were parish children, but under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work the girl was missing, and the boy being asked what was become of her, answered, that he had helped her up, and put on her clothes, and that she was gone he knew not whether. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into

\* 2 Roll's Rep. 114.

the water. During this search the man under whose care the children were, observed that a heap of dung near the house had been newly turned up: and upon removing the upper part of the heap he found the body of the child, about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged therewith, which he stily denied. When the coroner's jury met, the boy was again charged, but persisted still in denying the fact. At length being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning, (which was not true, for the bed was searched, and found to be clean); that thereupon he took her out of the bed, and carried her to the dung-heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap: placing the dung and straw that was bloody under the body, and covering it with that that was clean; and having so done, he got water, and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice very prudently deferred proceeding to a commitment, till the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself; and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former

former confession : upon which he was committed to gaol. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice : and of many declarations to the same purpose, which the boy made to other people after he came to gaol, and even down to the day of his trial. For he constantly told the same story in substance, commonly adding, that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confession, he was convicted. Upon this report of the chief justice, the judges having taken time to consider of it, unanimously agreed ; (1.) That the declarations stated in the report were evidence proper to be left to a jury ; (2.) That supposing the boy to have been guilty of the fact, there are so many circumstances stated in the report, which are undoubted tokens of what lord chief justice Hale somewhere calls *a mischievous discretion*, that he is certainly a proper object for capital punishment, and ought to suffer. For it would be of very dangerous consequence to have it thought, that children may commit such atrocious crimes with impunity. There are many crimes of the most heinous nature, such as in the present case, the murder of young children, poisoning parents or masters, burning houses, and the like, which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit ; and therefore though the taking away the life of a boy of ten years old may favour of cruelty, yet as the example of this boy's punishment may be a means of deterring children from the like offences ; and as the sparing this boy merely on account of his age will probably have a quite contrary tendency, in justice to the public the law ought to take its course, unless there remaineth any doubt touching his guilt. In this general principle all the judges concurred. But two or three of them, out of great

tenderness and caution, advised the chief justice to send another reprieve for the prisoner, suggesting that it might possibly appear on further enquiry, that the boy had taken this matter upon himself, at the instigation of some person or other, who hoped, by this artifice, to screen the real offender from justice. Accordingly the chief justice did grant one or two more reprieves : and desired the justice who took the boy's examination, and also some other persons in whose prudence he could confide, to make the strictest enquiry they could into the affair, and make report to him. At length receiving no further light, he determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last. But before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state. And at the summer assizes 1757, he had the benefit of his majesty's pardon granted to him upon condition of his entering immediately into the sea service <sup>b</sup>.

<sup>c</sup> Any new felony created by act of parliament, is not construed to extend to infants under fourteen years of age, but binds them at that age <sup>c</sup>. If a person drives his cart carelessly, and it runs over a child in the street ; if he had seen the child, and yet drove on upon him, it is murder : but if he did not see the child, it is manslaughter : but if the child ran across the way, and the cart ran over the child before it was possible for the driver to stop, it is by misadventure <sup>d</sup>. An infant under the age of twenty-one years, cannot wager his law, because he cannot be admitted to his oath ; and therefore on the other hand, that the course of justice may flow equally, the defendant, when an infant is plaintiff, shall not wager his law. For the particulars of that kind

<sup>b</sup> Fost. 70.<sup>c</sup> 1 H. H. 206.<sup>d</sup> Hale's H. 476.

of defence, and in what sort of actions it is admitted, see page 8. For the same reason an infant cannot be an approver <sup>e</sup>. An infant under the age of twenty-one years, shall not serve upon juries, or be sworn on an inquest <sup>f</sup>. An infant, though a trader, cannot be a bankrupt; for an infant can owe nothing but for necessaries: and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were due before. And no person can be made a bankrupt for debts which he is not liable at law to pay <sup>g</sup>.—If an infant being master of a ship at any foreign port, or British settlement, by contract with another, undertakes to carry certain goods from thence to England; and there to deliver them, but does not afterwards deliver them according to agreement, but wastes and consumes them, he may be sued for the goods in the court of Admiralty, notwithstanding his minority. For this suit is but in nature of a detinue, or trover, and conversion at the common law <sup>h</sup>. But if an infant draws a bill of exchange, yet he shall not be liable on the custom of merchants, but he may plead infancy, in the same manner as he may do to any other contract of his <sup>i</sup>.—A promissory note was given to an infant, payable when he the infant should become of age, and specifying the time when that was to happen, viz. the 12th of June 1750; and a verdict had been given for the plaintiff; and the court of King's Bench was moved to arrest the judgment, on a plea that this was not a good note within the statute, for giving like remedy upon promissory notes, as upon bills of exchange <sup>k</sup>. By lord Mansfield. This note would have been clearly good, if it had been made payable on the 12th of June, 1750, that is to say, on a day certain, without mentioned the plaintiff

<sup>e</sup> 2 Hawk. 205.<sup>f</sup> 7 & 8 W. c. 32. sect. 4.<sup>g</sup> Blackst.<sup>b</sup> II. c. 31.<sup>h</sup> Roll's Ab. 530.<sup>i</sup> Carth. 160.<sup>k</sup> 1 & 4 Ann,

c. 9. sect. 1.

being then to come of age. And surely it is not the less certain, for adding that circumstance. Legacies are of a different nature, and they are determined by different rules. They are directions to the executor to pay. And in legacies there is a known distinction between the time being annexed to the substance of the gift, or to the payment. If complete words of gift direct the executor to pay, the other words only fix the time of such payment. And then the legacy vests and is transmissible, though the legatee should die before the day of payment; as, a legacy given to be paid at the age of twenty-one years. But if the time is annexed to the substance of the gift, as, a legacy if, or when he shall attain to twenty-one years, it will not vest before that contingency happens. But here the words of engagement make the deed, and it is no direction to another person. The former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid. It is enough if it be certainly, and at all events payable at that time, whether he lives till then or dies in the interim; therefore it is a good note within this remediable statute. Indeed a contingent note, where it is uncertain whether the money shall ever become payable at all, is another case; such a note is not within the statute. But here is no condition or uncertainty; but it is to be paid certainly and at all events; only the time of payment is postponed. And the court agreed, that this is *debitum in præsentio*, though, *solvendum in futuro*<sup>1</sup>. It is doubted whether an infant can be imprisoned, because his infant indiscretion is his excuse; and he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named<sup>m</sup>. But an infant may be guilty of forcible entry in respect of personal and actual violence; and the justice may

<sup>1</sup> Goss against Nelson, H. 30 Geo. II. 1 Bur. Manf. 226. <sup>m</sup> Dalt, 399.



fine him for such offence<sup>n</sup>.—If an infant be of the age of fourteen years, he may be sworn as a witness; and if under that age; yet if it appear that he hath a competent discretion, he may be sworn. And in many cases an infant of tender years may be examined where the exigence of the case requires it, which being fortified with concurrent testimony, may be of some weight, especially in cases of rape, and such crimes as are practised upon children; but in no case, says lord chief justice Hale, shall he be admitted an evidence without being sworn<sup>o</sup>.—An infant committing a trespass against the person or possession of another, shall be compelled in a civil action to give satisfaction for the damage<sup>p</sup>.—An appeal may be brought against an infant<sup>q</sup>; and an infant may bring an appeal, although it take from the defendant the benefit of waging battel; but he must prosecute such appeal by a guardian<sup>r</sup>. They cannot enter into recognizance to keep the peace, or to be of good behaviour but by their sureties only<sup>s</sup>. An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous; but under that age he cannot be outlawed<sup>t</sup>. Infants seised of estates in trust, or by way of mortgage, may make conveyance thereof as the court of Chancery or Exchequer shall direct<sup>u</sup>. And such may surrender leases in the court of Chancery or Exchequer, in order to renew the same<sup>v</sup>. By the custom of London, an infant unmarried and above the age of fourteen, may bind himself apprentice to a freeman of London, by indenture, with proper covenants, which covenants by the custom of London, shall be as binding as if he were of full age<sup>w</sup>. In many real actions brought by or against an infant under the age of twenty-one years, and also in actions of debt brought against him, as heir to

<sup>n</sup> 1 Hawk. 147.

<sup>o</sup> 2 H. H. 278. 9. 84.

<sup>p</sup> 1 Hawk. 2

<sup>q</sup> 2 Hawk. 168.

<sup>r</sup> 2 Hawk. 161. 2.

<sup>s</sup> 1 Inst. 172.

<sup>t</sup> 2 H. H. 207.

<sup>u</sup> 7 Ann. c. 19.

<sup>v</sup> 4 G. III. c. 16. 29 G. II. c. 31.

<sup>w</sup> Moor 134.

any deceased ancestor, either party may suggest the nonage of the infant; and pray that the proceedings may be deferred till his full age, or in the language of the law; that the infant may have his age; and that the parole may demur: that is, that the pleadings may be stayed: and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. But in writs of entry *sur disseisin*, in some particular cases, and in actions ancestral brought by an infant, the parole shall not demur; otherwise he might be deforced of his whole property; and even want a maintenance till he came of age. So likewise in a writ of dower, the heir shall not take his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence. Nor shall the infant have it in a *quare impedit*, since the law holds it necessary and expedient that the church be immediately filled\*.—If an infant be lord of a copyhold manor, he may grant copyholds notwithstanding his nonage; for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor for which they have been demised, and have been demisable time out of mind<sup>y</sup>. If an infant, or his ancestors, being within age, do make an alienation of his lands, and the alienee enters and keeps possession; as the alienation is voidable, because made by a minor; the possession against the infant is wrongful, and a deforcement; and the remedy is by writ of entry or assize<sup>z</sup>.

\* Finch. 360. West. I. 3 Ed. III. c. 46. Glost. 6 Ed. I. c. 2. 1 Roll's Ab. 137, 138. <sup>y</sup> Cro. Copyholder, 79. 107. Noy, 41. <sup>z</sup> Finch. 264. F. N. B. 192.

*Of Apprentices.**Of binding Apprentices.*

**N**O one can be legally bound apprentice without deed indented. All indentures must be stamped with 2s. 6d. stamp, and a duty of 6d. in the pound must be paid by the master for every fee taken with an apprentice under 50l. and 1s. in the pound for every fee above 50l. <sup>a</sup>.—Or if any thing, not money, is given, as, if the parents of the apprentice engage to board and lodge him, or her, during the term of the apprenticeship, the duties shall be answerable to the value thereof <sup>b</sup>.

Parish apprentices alone are exempted from each of these regulations, but the indenture must have a 6d. stamp.

The duty must be paid for every indenture within the bills of mortality, within one month after the execution thereof. If out of the bills of mortality, within two months. If within fifty miles of the limits of the bills of mortality, within three months, and elsewhere within six months.

All indentures wherein the full sum, directly or indirectly given, shall not be inserted; or whereupon the duties shall not be paid, or which shall not be stamped within the time limited, shall be void, and not available in any court, or place, or to any purpose whatsoever; and the apprentice shall be incapable of exercising his trade, and the master is further liable to a penalty of 50l. and double duty <sup>c</sup>; but

<sup>a</sup> 8 Ann, c. 9.

<sup>b</sup> Ibid. sect. 45.

<sup>c</sup> 9 Ann, c. 21. sect. 66.

18 Geo. II. c. 22. sect. 23, 24.

the severity of these obligations was mitigated by 20 Geo. II. c. 45. which exempts a master from these penalties, if the indentures be stamped within two years after the determination of the apprenticeship, if before any suit has been commenced for the penalties. But if an apprentice in writing, signed with his own hand, in the presence of one witness, shall require his master to pay the duty, and the master shall neglect to do it for three months after, if the apprentice within two years after the determination of his apprenticeship pays the double duty, he may, within three months after such payment, demand of his master double the sum contracted for in the indenture; and if not paid in three months after, may recover the same by action at law. And if the term of his apprenticeship shall not be expired when he pays the double duty, if he signifies in writing his desire of being discharged his apprenticeship, he shall be discharged accordingly, and shall have the same benefit of the time he hath served as he would have had, in case he had been assigned or turned over to a new master<sup>d</sup>.—1 Geo. II. Smith and Birch. An action for enticing away the apprentice of the plaintiff, the plaintiff was non-suited, it being proved that the parchment was not indented, although the style of the writing began “This indenture,” it was therefore a deed-poll. But such writing is sufficient to procure the apprentice a settlement<sup>e</sup>. If a deed, or writing, begins *This indenture, &c.* and is not indented, it is no indenture, but it may work as a deed-poll. But if a deed is actually indented, and there are no words importing an indenture, it is nevertheless an indenture in law.<sup>f</sup>

<sup>d</sup> 18 Geo. II. c. 22. sect. 6, 7.  
Inst. 223. Cro. Eliz. 472.

<sup>e</sup> 31 Geo. II. c. 11.

<sup>f</sup> Wood's

*Who may be Apprentices.*

**N**O person shall be bound to enter into any apprenticeship other than such as are under the age of twenty-one years<sup>g</sup>. A covenant between the master and a third person, the infant not being party, makes no apprenticeship; but if the father of the apprentice, or any other person covenants for him, such covenant shall bind the person. As in the case of *Whitley and Loftus*, M. 10 G. II. the father covenants to pay the apprenticeship money; the son covenants to account for his master's goods; and in the conclusion, the father and son each bind themselves for the true performance of all covenants and agreements therein. By the court. The end of binding the father was to answer wrongs done by the son, and he must answer for any; and the covenant that each did bind himself must be so, where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be taken distributively; to wit, that each of the covenantors shall perform his part, and this makes the covenant of the son bind the father, who covenanted for him as well as for himself<sup>h</sup>. Every person that shall have three apprentices in any of the crafts of a cloth-maker, fuller, sheer-maker, weaver, taylor, or shoe-maker, shall keep one journeyman; and if he hath above three apprentices, for every one such he shall keep one other journeyman, on penalty of 10l.<sup>i</sup>

A master is allowed by law to chastise his apprentice with moderation<sup>k</sup>.

<sup>g</sup> 5 Eliz. c. 4. sect. 46.

<sup>h</sup> 3 Mod. 190.

<sup>i</sup> Ibid. sect. 33.

<sup>k</sup> Dalt. c. 58.

The obligation which the indentures lay on master and apprentice may be cancelled by the mutual consent of the parties. The master in such case must give leave under his hand for the apprentice to depart from his service, and then one justice out of session may discharge him, allowing the cause of his departure. The manner of proceeding by master or apprentice, in case of disagreement, is directed by 5 Eliz. c. 4. and 20 Geo. II. c. 19. Justices may discharge an apprentice from the master for ill-usage; so also they may discharge the master from the apprentice for evil and disorderly behaviour<sup>m</sup>, or may commit him to the house of correction for a time, to be kept to hard labour, or otherwise corrected as the nature of the offence may require.

The master assigning, and the apprentice consenting, will not make an apprentice to the assignee<sup>n</sup>, but by the custom of London he may be turned over to another<sup>o</sup>.

A person enticing an apprentice away from his master's service, is an offence for which the party injured may bring an action on the case<sup>p</sup>.

Apprentices, if they be fifteen years of age, stealing to the value of 40s. in a dwelling-house or out-house thereto belonging, though such house be not broken, and though no person be therein, are guilty of felony without benefit of clergy<sup>q</sup>.

An apprentice to a surgeon was sent by his master to the East-Indies: it was adjudged that the master cannot compel his apprentice to go beyond the sea, except the master go with him, but he may send him to any part of England<sup>r</sup>.—

<sup>l</sup> Dalt. c. 58.

<sup>m</sup> Read. Appt.

<sup>n</sup> 5 Eliz. c. 4.

<sup>o</sup> Dalt. 58.

<sup>p</sup> 1 Burrow, 1 Bol.

<sup>q</sup> 12 Ann. st. c. 7.

<sup>r</sup> Brownl. 67.

Otherwise if it be expressly so agreed, or the nature of the apprenticeship imports it, as if the master be a master adventurer, or sailor<sup>s</sup>, T. 4 G. I. King and inhabitants of Hales Owen. An order reciting that Joseph Higgen was bound out by indenture, as the statute requires, to John Parkes, and being lame, and having the king's evil, and in the opinion of surgeons incurable, therefore the justices discharge the master from his apprentice. It was moved to confirm the order, because the master now cannot have the end of the binding, which was the service of his apprentice. But it was answered, that the statute only empowers the justices to discharge for misbehaviour, and not for sickness. And quashed by the court: for the master takes the apprentice for better and worse, and is to provide for him in sickness and in health<sup>t</sup>. The apprentice to a freeman of the city of London, bound and enrolled there, but who lived with his master out of the city of London, may be discharged by the justices of Middlesex, because neither the chamberlain, nor any other city magistrate, has a power to compel the master's appearance before them<sup>u</sup>. If a master does not appear to his recognizance, the justices have a right to discharge his apprentice, as fully as the act allows them to do in case of the appearance of the master, and the complaints against him being well founded<sup>v</sup>.

A master is bound in certain cases to refund part of the money he has received with his apprentice; for when the ends of the apprenticeship cannot be obtained with one person, it is but justice the master should return part of the money he has received with his apprentice, in order to place him out with a new master<sup>w</sup>. An apprentice running away

<sup>s</sup> Hob. 134.<sup>t</sup> Str. 99.<sup>u</sup> Str. 663.<sup>v</sup> 2 Salk. 490.<sup>w</sup> 2 Bac. Abr. Master and Servant, page 74.

from his master, and going into another shire, the justices or mayors may issue writs of capias to the sheriff of the county, or other head officers of the place whither he shall flee, to take his body returnable before them, at what time shall please them, so that if he come by such process he may be put in prison, till he find sufficient security well and honestly to serve his master.

A master is entitled generally to all the apprentice shall earn; and if he runs away, and goes to a different business, the master is entitled to all his earnings. But there are peculiar circumstances in which this general rule is not admitted. An apprentice had quitted his master's service of a shipwright against the consent of his master, whilst his indentures remained in full force, and went on board a privateer, which took so considerable a prize that the apprentice's share amounted to 1200l. which the master claimed. Lord Hardwicke observed, that as the boy's share of the prize was so very large, the balance ought to be in his favour, and therefore recommended it to the master to compound the matter. His lordship said there was nothing in equity to relieve, but he would send the case to be tried at law, unless they chose to settle the matter by composition. The master accordingly agreed to take 450l<sup>x</sup>.

If any apprentice shall absent himself from his master's service before the term of his apprenticeship shall be expired, he shall, at any time thereafter, whenever he shall be found, so it be within seven years after the expiration of his term, be compelled to serve his said master, for so long time as he shall have absented himself, unless he shall make satisfaction to his master for the loss he shall have sustained by such

<sup>x</sup> 1 Vezey, 83.



absence: and if he shall refuse so to serve, or to make satisfaction, the master may complain on oath to one justice where the apprentice resides, who shall issue his warrant for apprehending him. And such justice on hearing the complaint, may determine what satisfaction shall be made to such master by the apprentice: and if the apprentice shall not give security to make satisfaction according to such determination, such justice may commit him to the house of correction, for any time not exceeding three months <sup>v</sup>.

It has been held, that an apprenticeship is a personal trust between the master and the servant, and determinable on the death of either of them. But Holt chief justice held, that by the custom of London the executor of the master should put the apprentice to another master of the same trade; and that in other places it would be very hard to construe the death of the master to be a discharge of the covenants, though he admitted that the covenant for instruction had been considered as cancelled, but that he still continued an apprentice, with the executor as to maintenance <sup>z</sup>.—And in the case of Baxter against Burfield, Lee chief justice, the opinion of the court then was, that an executrix could maintain no action against an apprentice for absenting himself from service after the death of his master. It was said the binding was to the man, to learn his art, and serve him, without any mention of executors; and as the words are confined, so is the nature of the contract, for it is fiduciary, and the apprentice is bound from a personal knowledge of the integrity and ability of the master <sup>a</sup>. And where a master received with an apprentice 25*l*. and died within two years, the apprentice during that time having been employed only in inferior affairs. It was decreed, after debts

<sup>v</sup> 6 Geo. III. c. 25.

<sup>z</sup> 1 Salk. 66.

<sup>a</sup> Str. 1266,

on specialties paid, that the executors repay 250l. as a debt due on simple contract, deducting after the rate of 20l. a year for the maintenance of the apprentice; during the time he lived with his master<sup>b</sup>. So likewise an apprentice, whose master having received 80l. with him, in six months after became a bankrupt. On petition to the court of Chancery, praying, that on deducting 10l. out of the 80l. for the apprentice's board with the bankrupt during the six months he lived with him, the assignees should be ordered to pay him the sum of 70l. out of the effects of the bankrupt already come to their hands, and not oblige him to prove it as a debt under the commission. The lord chancellor Hardwicke was at first doubtful, and seemed inclined to grant the petition, but on ordering search to be made for precedents, and several being produced, wherein it was directed that apprentices should come in as creditors only, upon the sum remaining, after deducting for the time they lived with the bankrupt, it was ordered accordingly in this case, and he thought the petitioner should be admitted a creditor of 70l. only<sup>c</sup>.

### *Of Parish Apprentices.*

**T**HE churchwardens and overseers, or the greater part of them, by the assent of two justices, one of which shall be of the quorum, may bind any children whose parents they shall judge not able to maintain them, to be apprentices where they shall see convenient; if a man child, until he shall come to the age of twenty-four years; if a woman child, of twenty-one years, or marriage; and this they may do as effectually as if such child were of full age, and by indenture of covenant, bind him or herself<sup>d</sup>; but

<sup>b</sup> Case of Soam against Bowden and Eyles, in the court of Chancery, M. 30 G. II. Cha. Ca. Finch, 396.

<sup>c</sup> & Atkins, 149.

<sup>d</sup> 43 Eliz.

the age of boys is by act 7 G. III. c. 39. restricted to twenty-one years, within the bills of mortality only; by which last act, the governors of the Foundling Hospital are invested with the same power as churchwardens and overseers of parishes.

No contract can be made between the justices of peace and the master of an apprentice for wages, or any thing on behalf of the apprentice, other than maintenance<sup>e</sup>.

A master taking an apprentice from the parish, may assign him over, and the justices cannot take cognizance of such assignment, it being held, that the master performs his covenant properly, by assigning him to another to provide for him; but if the assignee of the apprentice doth not provide for him, the first master may be compelled to do it<sup>f</sup>.

The master of a parish apprentice dying intestate, if the widow, without any administration taken out, assign the apprentice over, with his consent, if barely verbally, to another master, residing in a different parish, and the apprentice live with such assignee forty days and upwards, he obtains a good settlement in that last place<sup>g</sup>.

A parish apprentice indented until his age of twenty years, served his master for several years under that indenture. At the age of seventeen he ran away, soon after which his master died, and the apprentice hired himself for a year, and re-

<sup>e</sup> Foley, 205.  
Sett. Ca. 173.

<sup>f</sup> Foley, 155. 1 Sett. Ca. 110.

<sup>g</sup> Burrow's

ceived all his wages to his own use; the executors of his master taking no notice of him, it was determined by the quarter sessions of the peace <sup>h</sup>, that the said apprentice, by virtue of such hiring and service, gained a settlement in the parish where he was so hired and had served, and that his legal settlement was there <sup>i</sup>. Mary Bray came by certificate from Lancrass to Bideford, and inhabited there some years. The parish-officers of Lancrass then bound her apprentice at Great Torrington by indenture. After the expiration of that apprenticeship, she went to Bideford, and there hired herself for a year.—Adjudged. That she had gained by her service a settlement in Bideford, and that the serving her apprenticeship in Torrington annulled the certificate <sup>k</sup>.

To entitle an apprentice to a settlement in the parish where he serves, it is necessary that the contract between him and his master be in writing.—that it be duly stampd—and that it be indented.—An infant binding himself apprentice, thereby gains a settlement. For though he cannot bind himself by any deed, yet he may make an indenture for his own benefit, and such is that of an apprenticeship <sup>l</sup>.

Binding apprentices for less term than seven years, is sufficient to gain a settlement.—Hardwicke, chief justice. Such indenture is not void, but only voidable at the election of the parties themselves, if they think fit to take advantage of it: and not by a third person. It can only be avoided by the master or servant who are the parties to it, but not by the parish who have had the benefit of the service of this appren-

<sup>h</sup> E. 26 G. II.

<sup>i</sup> Burrow's Set. Ca. 320.

<sup>k</sup> Ibid 428.

<sup>l</sup> Foley, 154.

tice <sup>m</sup>. So likewise a parish girl, bound apprentice until her age of twenty-one years, without the alternative, or till time of marriage, as the statute requires ; this does not allow the parish to refuse such pauper a settlement. An apprentice was bound to a cobbler, who kept a stall in one parish, lived in another, and the boy in a third. The session adjudged the settlement where the stall was, because the service was there.—But the order was quashed by the court. The boy has gained no settlement in any of the three parishes ; for the stall is not sufficient to give him one, the master lying in another parish <sup>n</sup>.

An apprentice, his master dying, and he being assigned over to another by his master's executor, he consenting to such assignment, and serving more than forty days the master to whom he is so assigned, he shall gain a settlement, although an assignment of an apprentice be not strictly legal <sup>o</sup>. But a master dying before the expiration of the term for which his apprentice was bound, and the apprentice hiring himself for a year, and serving that year, gains him a settlement ; for apprenticeship is a personal trust between master and servant, and is determined by the death of either master or apprentice <sup>p</sup>.

### *Apprentices to the Sea Service.*

**EVERY** owner of a ship or vessel, and every householder exercising the trade of the sea, by fishing or otherwise, and every gunner, commonly called a cannoneer, and every

<sup>m</sup> Burrow's Set. Ca. 91.  
E. 3 G. 1. Str. 51.

<sup>n</sup> Case of K. and St. Olaves Jury,  
<sup>o</sup> Burrow's Set. Ca. 133.

<sup>p</sup> Ibid 320.

shipwright, may take apprentices for ten years or under, and every apprentice so taken, being above seven years of age, shall be by the same covenants bound, ordered, and used to all intents according to the custom of London, so that the covenant or bond of apprenticeship be made by writing indented, and enrolled in the town where the apprentice shall be inhabiting, if it be a town corporate, if not, then in the next town corporate, for which enrollment shall be paid not above 12d<sup>9</sup>. Two justices, and the principal parish officers, may put out any boy of the age of ten years or upwards, who shall be chargeable, or who shall beg for alms, to be an apprentice to the sea service, to any subject, being master or owner of any ship or vessel, until he shall attain the age of twenty-one years; and such master, or his executors or administrators may, with the concurrence of the justices and parish officers as above, assign over by indenture such poor apprentice to any master or owner of a ship or vessel, using the sea, during the remaining time of his apprenticeship<sup>r</sup>; and every master or owner of a ship from thirty to fifty tons burden, shall be obliged to take one apprentice from the parish, and another for the next fifty tons, and one more for every other one hundred tons, on pain of forfeiting 10l. to the parish. But no obligation lays on such master to take a boy under thirteen years of age, or who has not sufficient health and strength for the service<sup>s</sup>. The age of such boy must be inserted in the indenture, which age must be procured by the best means of information that can be obtained: and if from a register book, a copy must be given and signed by the minister without fee. And such apprentice is entitled to a protection gratis from the Admiralty, until he attain the age of eighteen years. The churchwardens and overseers shall convey such apprentice

<sup>9</sup> 5 Eliz. c. 5. s. 12.  
f. 16.

<sup>r</sup> 2 & 3 Ann, c. 6. s. 1.

<sup>s</sup> 4 Ann, c. 19.

to the port to which his master belongs, and the charges are appointed to be defrayed out of the gaol and Marshalsea money, which money is paid out of the general county rates, by 12 G. II. c. 29.

*A Boy voluntarily binding himself Apprentice to the Sea Service.*

**A** Boy voluntarily binding himself apprentice to the sea service, shall not be impressed for three years from the date of his indentures; and a certificate shall be granted him without fee, his indentures being registered, and certificates thereof transmitted. But no person above the age of eighteen years, shall have any protection from being impressed, who shall have been in any sea service before he bound himself apprentice<sup>t</sup>; but if he has never been used to the sea before his binding himself apprentice to serve at sea, he shall be exempt from being impressed for three years, for which a protection from the Admiralty shall be granted without fee<sup>u</sup>. And if such apprentice voluntarily enters into the king's service, his master, or any other claiming under him, shall be entitled to able seamen's wages, if such apprentice be found qualified to receive such wages.

<sup>t</sup> 4 Ann, c. 19. s. 17.

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